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SASAKAWA PEACE FOUNDATION

Beyond Commodification, Toward Job Creation: Indonesia at a Crossroads

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A Human Rights Impact Assessment for Japanese Businesses Investing in Indonesia

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1. PART ONE: INTRODUCTION AND EXECUTIVE SUMMARY

1.1 Japan and Indonesia: The Business and Human Rights Context

On 16 October 2020, the Inter-Ministerial Committee for Japan's National Action Plan (NAP) launched its first Business and Human Rights plan (the BHR Plan). The Japanese BHR plan marks an important milestone in Japan's business and human rights journey. Since the adoption and unanimous endorsement of the United Nations Guiding Principles on Business and Human Rights (UNGPs)¹ in June 2011, Japan has consistently prioritized implementing the UNGPs.² In addition to maintaining public support for the UNGPs through its role on the Human Rights Council as well as in the G7 and G20 economic summits, Japan has continued to encourage progressive efforts undertaken by Japanese companies to advance initiatives on respecting human rights in the business context.³ Japan sees this as in line with boosting and maintaining Japanese companies' competitiveness in the global market.⁴ At the same time, Japanese companies no longer consider the responsibility of human rights as solely being with the state. As was noted in a recent report issued by the United Nations Global Compact together with 34 major multinational corporations headquartered in Japan:

Since [World War II], however, the world has changed: globalisation, deregulated trade and the transfer of traditionally state-based services (such as security and the management of natural resources) to corporations has led to companies having an increased ability to affect the environment and the rights of individuals, both positively and negatively.

...

For responsible companies, the avoidance of legal sanctions is secondary motivation – first and foremost, corporate respect for human rights ensures that they, at a minimum, do not harm the individuals and communities that are impacted by their activities.⁵

In response to this, the Sasakawa Peace Foundation has asked the Human Rights Resource Centre (for ASEAN) ('HRRRC') to provide it with its first Business and Human Rights Impact

¹HR/PUB/11/04 'United Nations Guiding Principles on Business and Human Rights' (United Nations, 2011). See also: A/HRC/17/31 'United Nations Guiding Principles on Business and Human Rights: Implementing the Protect, Respect and Remedy Framework' (HRC, 21 March 2011) (UNGP).

²See: 'Statement by Amb. Shinto to the 2016 United Nations Forum on Business and Human Rights', 16 November 2016, Permanent Mission of Japan to the International Organizations in Geneva, available online at: <https://www.geneve-mission.emb-japan.go.jp/itpr_en/statements_rights_20161116.html> [Accessed 23 February 2021]; Statement by Amb. Ken Okinawa to the 2018 United Nations Forum on Business and Human Rights', 26 November 2018, Permanent Mission of Japan to the International Organizations in Geneva, available online at: <<https://globalnaps.org/wp-content/uploads/2019/01/statement-for-the-7th-un-forum-on-business-and-human-rights-japan.pdf>> [Accessed 23 February 2021]; Government of Japan, The Report of the Baseline Study on Business and Human Rights (Executive Summary): Toward Developing Japan's National Action Plan on Business and Human Rights (December 2018), available online at: <<https://globalnaps.org/wp-content/uploads/2019/04/japan-the-report-of-the-baseline-study-on-bhr.pdf>> [Accessed 23 February 2021] (Hereafter '2018 Baseline Study - Japan').

³2018 Baseline Study - Japan (note 2), 2.

⁴Ibid.

⁵UN Global Compact, Japan 'Business and Human Rights: Corporate Japan Rises to the Challenge' (UN Global Compact and EY, 2016), 8.

Assessment ('BHRIA') for Japanese investors and companies operating in Indonesia. Taking the UNGPs as the primary source from which to conduct this assessment, the following report provides an overview of the most severe and the most irremediable forms of human rights abuse occurring in the private sector in Indonesia.⁶ It also further considers Indonesian workers in global supply chains where Japanese companies and investors may cause, contribute or be linked to gross violations of human rights - specifically, modern slavery.⁷ This BHRIA considers the risks of third party (corporate) human rights abuses committed against Indonesian rights-holders.⁸ Abuses in this context are committed by or on behalf of transnational corporations and other business enterprises ('TNC-OBES') both domiciled in Indonesia and against Indonesian workers in global supply chains.

The release of the NAP in Japan and of this BHRIA closely coincides with the development and enactment of the controversial "omnibus" Law No. 11/2020 on Job Creation in Indonesia, which was passed in November 2020. The Job Creation Law's primary target is addressing regulatory constraints by cutting regional regulatory discrepancies and streamlining investment processes in order to stimulate job creation.⁹ The Law is intended to provide a base to harmonize central and regional policies further expected to create legal certainty and also prevent and minimize corruption. Based on the Law, micro, small, and medium enterprises and cooperatives will also receive special assistance such as legal assistance, financing accounting/accounting system/application training and assistance and medium-sized enterprises and cooperatives, in a further attempt by the Jokowi administration to encourage local empowerment of industry.¹⁰ The Law is expected to solve common challenges faced by small and medium-sized enterprises and cooperatives such as access to financing and licensing by giving obligation to state-owned-enterprises, national and foreign enterprises to provide financing for micro and small enterprises by providing loans, guarantees, grants and other forms of financing.¹¹

While the Job Creation Law promises to provide Indonesia with the capacity to facilitate investment and streamline the regulation of business activities generally, a key concern of this report is the extent to which the Law substantially improves the capability of Indonesian workers,

⁶UNGP (note 1), Principle 24.

⁷UNGP (note 1), Principle 13. Abuses here are limited to the most egregious forms of human rights abuse due to the limitations in scope of this report. See Section 1.2 (Theory and Methodology).

⁸An 'abuse' is distinct from a violation, in that the abuser is not a party to the relevant human rights convention to which obligor (the state) is obliged to enforce the right and therefore cannot be treated as capable of directly violating it. However, there is growing evidence, as a matter of customary international law, that a corporation can be bound by international law. See in particular, Andrew Clapham, 'Human Rights Obligations for Non-State Actors: Where are We Now?' in Fannie Lafontaine and Francois Larocque, *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour* (Intersentia, 2019).

⁹ Pidato Pelantikan Presiden Jokowi (2019).

¹⁰The Indonesian Investment Coordinating Board (Badan Koordinasi Penanaman Modal/BKPM), *Invest Magazine*, Vo.2/2020.

¹¹ Dzulfiqar Fathur Rahman, "Ministry prepares regulation on small businesses to implement jobs law", the Jakarta Post <https://www.thejakartapost.com/news/2020/10/09/ministry-prepares-regulation-on-small-businesses-to-implement-jobs-law.html>, [Accessed on 17 March 2021. Hereafter, all websites have been checked on this date]. See also PWC, *Omnibus Law to Support Micro, Small, and Medium Enterprise*; PWC Indonesia, *Omnibus Flash / February 2021 / No. 05*.

their families and communities, to progressively realise their economic, social and cultural rights ('ESC rights').¹² In particular, it rejects the view that: (1) formal equality between rights-holders (being legal and natural persons) is sufficient to ensure the proper exercise of such rights; and (2) the progressive realisation of ESC rights remains solely the responsibility of the State of Indonesia (and, by extension, the Jokowi government), rather than the state together with TNC-OBEs. Although the report considers the responsibilities of TNC-OBEs as narrowed to a responsibility to 'do no harm' (in keeping with the UNGPs, and the commitments of both the Japanese government and Japan's leading business enterprises), this commitment is construed as, first and foremost, aiming at parity between rights-holders, both to participate in social life and to exercise their rights, rather than merely formal equality.¹³ This is centred on *both* the redistribution of wealth and the politics of rights-holders' recognition - be they women, children, ethnic minorities, Indigenous Persons or persons with disabilities.¹⁴ Hence, this BHRIA considers the structural inequalities faced by Indonesian rights-holders, and the extent to which business' commitment to 'do no harm' can transform these existing structures.

1.2 BHRIA: Theory of Change and Methodology

Theory of Change. As already stated, this BHRIA takes as its starting point a commitment toward equality of parity between Indonesian rights-holders. 'Equality of parity' is defined as: the capability of each Indonesian rightsholder to *exercise* their right to participate in social life and to attain access to an adequate standard of living through the progressive realisation of their ESC rights, regardless of their race, ethnicity, gender or level of income.¹⁵ This is distinct from a formal right, which may exist 'on paper' but yet be unable to be claimed in practice. This is in keeping with the Japanese government's recent Development Cooperation Charter (decided by the Cabinet in February 2015), which incorporates: consolidation of democratization in developing countries, situations regarding the rule of law and the protection of basic human rights, implementation of development cooperation which takes full account of the environment, consideration for ensuring equity and consideration for the socially vulnerable (including ethnic minorities and indigenous peoples), and promotion of women's participation, into Japan's development cooperation agenda.¹⁶ Furthermore, Japan's government agencies, such as the Japan International Cooperation Agency and Japan Bank for International Cooperation, have also

¹²Indonesia is a party to both the International Covenant on Civil and Political Rights (ICCPR) as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR), which it ratified on 23 February 2006. See: International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 23 March 1976) 993 UNTS 3 (ICESCR).

¹³On equality of parity, see in particular, Benjamin Thompson, 'Determining Criteria to Evaluate Outcomes of Businesses' Provision of Remedy Applying a Human Rights-Based Approach' (2017) 2(1) *Business and Human Rights Journal* 55, 73, 81-82. See also, Amartya Sen, 'Human Rights as Capabilities' (2005) 6 *Journal of Human Development* 151 and compare Florian Wettstein, *Multinational Corporations and Global Justice* (Stanford: Stanford University Press 2009)

¹⁴Nancy Fraser, 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in George Henderson and Marvin Waterstone (eds) *Geographic Thought: A Praxis Perspective* (Routledge 2009) 72.

¹⁵ICESCR (note 12), Article 11(1) and 2(1).

¹⁶2018 Baseline Study - Japan (note 2), 8.

introduced guidelines for environmental and social governance into their practice further assessing the impact of their projects on human rights, the environment, and society.¹⁷

The theory of change that this BHRIA is premised upon is therefore as follows:

‘By understanding the structural causes of the most egregious forms of human rights abuse, Japanese companies can begin to effect meaningful change in the business environment in Indonesia, in order to ensure the long-term health and welfare of Indonesian rights-holders and, by extension, the global supply chains of which they form a part’.

Methodology. In keeping with the methodology as determined by the Baseline Study supporting Japan’s National Action Plan, the HRRRC has adopted methods as proposed by the Danish Institute for Human Rights and the International Corporate Accountability Roundtable in the conduct of this assessment.¹⁸ For the purposes of this initial research and assessment, the HRRRC has limited the scope of its exercise to three core areas in which the planning and scoping for the BHRIA was conducted.¹⁹ These were:

- (1) **Land and land conflicts**, which remain the primary site of the most egregious human rights violations and abuses in Indonesia, disproportionately affecting Indonesia’s most vulnerable and marginalised groups, including Indigenous Persons, in the plantation, forestry and mining sectors;
- (2) **Labour**, being the site at which rightsholders in the garments, palm oil and tobacco sectors remain most at risk of rights abuses, particularly as they pertain to modern slavery and child labour; and
- (3) **Money and corrupt practices**, which remain an ongoing concern in Indonesia’s key industries, including in mining and plantations.

These areas were selected for two reasons. First, land, labour and money are themselves fundamental to social life, and yet have become so commodified that their ongoing exploitation risks destroying the parameters through which both individual societies and the international community together operate. This is perhaps no more apparent than with regard to the recent Covid-19 global pandemic, and the manner in which this public health crisis has brought to the fore the planetary limitations associated with under-estimating their value. The crisis has shown the limitations of thinking of land, as distinct from the natural environment which should be used to sustain life (rather than merely exploit it); labour, as distinct from peoples’ capacity to flourish through guaranteed work, as jobs become ever-more precarious; and money, as more than a mode of determining exchange value, as financial institutions and foreign investors risk further entrenching the effects of Covid-19, by failing to make available the \$2.5 trillion in loans developing countries require to meet their Covid needs and the relevant support to governments to maintain policy space to remain resilient and responsive.²⁰ As Takahashi and Vazquez have recently found,

¹⁷Ibid.

¹⁸2018 Baseline Study - Japan (note 2), 3.

¹⁹See Danish Institute for Human Rights, ‘Phase One: Planning and Scoping’, HRIA Tool Box, available online at: <https://www.humanrights.dk/business/tools/human-rights-impact-assessment-guidance-toolbox/phase-1-planning-scoping>.

The HRRRC’s BHRIA is a desk-based analysis providing the structure for further research with key stakeholders in the future.

²⁰Thomas Stubbs et al, ‘Whatever It Takes? The global financial safety net, Covid-19 and developing countries’ (2021) 137 World Development 1.

"The Covid-19 crisis provides an opportunity for businesses to share and realise their values through respect for the human rights of stakeholders, and to be transformed into truly sustainable businesses by adding value and fulfilling their responsibilities to society. This effort would enhance business resilience to crises, strengthen business continuity, and increase corporate values in the medium to long term."²¹

Understanding this opportunity in terms of land, labour and money provides for a sea-change in thinking about the global economy that may yet prove of benefit both within and beyond Indonesia and Japan's relationship.²²

Second, based on a preliminary assessment of the most severe and most irremediable human rights violations, industries in Indonesia faced the greatest risk of exacerbating human rights abuses in terms of land conflicts, labour disputes and corrupt practices. As such, the data suggested that this should be prioritized in our analysis.

The following report and findings are based on a desk-based analysis of existing reports (both domestic and international) and government data (in Indonesia) only. It is a key recommendation of this initial scoping exercise that further research is undertaken to verify the initial findings included here.

1.3 Key Findings and Executive Summary

Based on our analysis and initial research, the HRRC finds as follows:

Land

Key violations:

- Land grabbing and forced eviction, resulting in the violation of the right to adequate housing;
- Unauthorized uses of land and boundary disputes, resulting in some instances in the criminalization of communities, and violations of their fundamental freedoms, particularly freedom of movement and the right to choose one's own residence;
- Pollution and environmental damage resulting in a failure to provide access to water, a violation of the right to adequate food; and
- Violations of the rights of indigenous persons.

²¹Daisuke Takahashi and Rachel Nahmad Vasquez, Japan: promoting the respect of human rights by business during the Covid-19 crisis (International Bar Association, Business and Human Rights Committee (Japan), 2021), available online at: <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=c4369e58-d011-4da0-9956-742fb8b42a46> [Accessed 27 February 2021].

²² Nancy Fraser, 'Can Society be Commodities All the Way Down? Post-Polanyian Reflections on Capitalist Crisis' (2014) 43 *Economy and Society* 541; Karl Polanyi, *The Great Transformation* [1944] (Beacon Press, 2001). The choice of Polanyian economic theory is due to the manner in which Polanyi's work has informed the mandate of the Special Representative to the Secretary General, John Ruggie's formulation of the UNGP. See: John Ruggie, 'Global Governance and "New Governance Theory": Lessons from Business and Human Rights' (2014) 20 *Global Governance: A Review of Multilateralism and International Organizations* 5-17; Claire Methven O'Brien, Claire Methven-O'Brien, 'The UN Special Representative on Business and Human Rights: Re-embedding or Dis-embedding Transnational Markets?' in Christian Joerges and Josef Falke (eds) Karl Polanyi, *Globalisation and the Potential of Law in Transnational Markets* (Hart 2011) and Michelle Staggs Kelsall, 'From a Stark Utopia to Everyday Utopias' (2017) 60 *German Yearbook of International Law* 576.

Sectors at most risk: TNC-OBEs operating in the mining, plantation and forestry sectors are at most risk of causing, contributing or being linked to these violations.

Trends to watch for Land. A further aspect to be considered when thinking about the current landscape of human rights abuses as they pertain to land is the effect that Indonesia's Job Creation Law (Law No. 11/2020 on Job Creation) will have on the lands and livelihoods of Indonesia's poorest and on its indigenous communities. HRRC predicts that, far from expanding Indonesia's industries in favour of job security and secure land title for Indonesia's working population, the Job Creation Law is likely to further exacerbate existing land disputes in these sectors and be of further detriment to Indonesia's indigenous peoples when attempting to exercise land rights.

Labour

Key violations:

- **Industrial relations disputes.** An increasingly competitive environment for Indonesian industries combined with weak government oversight has meant industrial relations disputes greatly impact a wide number of laborers in Indonesia. The most frequently reported cases pertain to the termination of employment, dispute on wages, salary and other allowances, prohibition of the formation and activity and labour unions, and prohibition of strikes – a violation of labourers' rights to fair and equal wages,²³ and to freely form and exercise their right to strike as part of that union, both of which are guaranteed by Indonesia under the ICESCR.²⁴
- **Modern slavery (particularly in agriculture and fisheries).** Modern slavery has also been under the spotlight in Indonesia since the revelation of slavery-like practices in Indonesian fisheries in 2015 where migrant workers, mostly from Myanmar, were kept in cages, forced to work and often beaten and tortured.
- **Child labour (particularly in the agricultural sector).** Child labour in the agriculture sector also continues to be rampant, affecting millions of children in Indonesia.²⁵ In about 80% of cases, child labourers are not paid, and 44% are exposed to hazardous conditions, such as dangerous objects and extreme temperatures²⁶. Amongst child laborers aged 10-17, 60% of child labour is in the agriculture industry.²⁷

Sectors at most risk: Agriculture, tobacco, fisheries and palm oil are the sectors at most risk of the most egregious labour practices and labour disputes.

Trends to watch. There are several important labour trends in Indonesia. Youth unemployment, skills shortages, and skills mismatches are persistent challenges for the Indonesian economy.²⁸ Furthermore, corporations' lack of compliance with existing labour regulations continues to be a common problem, prolonging weak labour protections 'on the ground'. This is despite the fact

²³Article 7(a)(i), ICESCR.

²⁴Article 8(c) and (d), ICESCR.

²⁵ Concluding Observations on Committee on ESCR, 8, Section 23.

²⁶ ILO Child Labour Roadmap 2022, 14.

²⁷ ILO Child Labour Roadmap 2022, 13.

²⁸ Ibid.

that, after *Reformasi* (the 1998 fall of New Order regime and the subsequent transition to democracy), Indonesia adopted various international human rights standards, including the International Covenant on Economic, Social and Cultural Rights (ICESCR) and reformed its labour law through Law No. 13/2003 on Manpower, Law No. 21/2000 on Trade Unions, and Law No. 2/2004 on Industrial Relations Disputes Settlement. Although the aim of these regulations is to give more labour protections, especially in respecting laborers' dignity and rights as human beings, labour abuses still persist. Labourers who stage protests are still often being threatened by their employers. Cases of excessive overtime, unpaid social security and pension contribution, as well as underpaid wage remain common. Furthermore, asymmetric relationships between employers and labourers as well as weak government oversight contribute to the higher risk of labourer rights abuses.

Money

Key violations: Corruption remains the most challenging part of ensuring financial flows and transactions remain transparent, efficient and effective in Indonesia. Yet while anti-corruption measures seek to maintain ongoing good governance initiatives in the country, they also further exacerbate the State's capacity to focus its resources on responding to the progressive realisation of economic, social and cultural rights for Indonesian rights-holders. The cost implications of corruption are therefore great.

At the same time, Indonesia's recent renegotiation of over 30 bilateral investment treaties has shown the government wishes to open up the policy space to further invest in health and the environment. To date, however, there has been very limited evidence that these reforms are underway, with the controversial Job Creation Law once again prioritising the efficiency and effectiveness of Indonesia's licensing regime over that of reducing its reliance on mining, forestry and agro-based industries - overreliance on which may prove to the detriment of those most vulnerable to human rights abuses.

Sectors at most risk:

Illegal mining in Indonesia's forests. weak oversight on permit issuance has caused Indonesia to potentially lose revenue of 15.9 billion rupiahs due to illegal mining in Indonesian forests. Namely, Kalimantan, Sumatera, and Papua have become the most vulnerable to illegal mining.²⁹

Tax leakage in the plantation sector. In the palm plantation sector, the Corruption Eradication Commission (KPK) estimated that the loss of revenue that Indonesia experiences comes from tax leakage. In their 2019 annual report, KPK estimated that in 2003-2014 Indonesia has lost potentially 18.2 billion rupiahs. With potential tax collected from the palm plantation industry ranging up to 40 billion rupiahs, only 21.8 billion rupiahs was collected.³⁰ This may have widespread implications.

²⁹Komisi Pemberantasan Korupsi, 'Laporan Tahunan 2017: DEMI INDONESIA UNTUK INDONESIA' (Komisi Pemberantasan Korupsi 2018) <<https://www.kpk.go.id/id/publikasi/laporan-tahunan/937-laporan-tahunan-kpk-2017>>.

³⁰Komisi Pemberantasan Korupsi, 'Laporan Tahunan 2019: Tak Sekadar Merangkai Simfoni' (Komisi Pemberantasan Korupsi 2020) <<https://www.kpk.go.id/id/publikasi/laporan-tahunan/1702-laporan-tahunan-kpk-2019>>.

Trends to watch:

The Centralization of government authority may exacerbate (rather than alleviate) corrupt practices. In order to investigate, prosecute, and mitigate corruption/bribery practices, the Indonesian government KPK through Law No 30/2002. Since 2019, however, KPK has operated through a new mechanism, especially with the adoption of the Law No. 19/2019. KPK has transformed from an independent agency to a central government body, focusing on corruption prevention rather than eradication. According to the Law No.19/2019, KPK's leadership should be subordinate to the President through a supervisory board and the Police Chief. KPK requests for surveillance also must be 'board-approved', limiting the independence of KPK's investigative powers.

New loopholes created through the Job Creation Law. The Job Creation Law has been criticized for being unable to mitigate corrupt practices comprehensively. Instead, the Job Creation Law provides new loopholes for officials and businesses to commit bribery, especially in big industries. One of the examples of this is the forestry sector. Article 36 of the Job Creation Law amends the Indonesian Forestry Law which previously required that all regions in Indonesia maintain a minimum of 30 percent of the area of watershed (DAS) and/or islands as forest area. Article 36 of the Job Creation Law scraps this requirement and instead leaves it up to the government to determine the amount of forest area that will be sufficient to prevent environmental degradation and natural disasters.

The following report explains in greater depth the findings articulated here. The assessment of the severity and likelihood of any given risk will be determined utilising a critical human rights-based approach (CHRBA) to the criteria identified. A CHRBA approach to research identifies and analyses rights fulfilment in terms of the State of Indonesia's capacity to ensure social arrangements that protect rightsholders from the worst abuses and deprivations, and subsequently, TNC-OBE's capacity to maintain respect for human rights in the business environment created by the State of Indonesia.

2. PART TWO: LAND

Snapshot. Land is at the centre of a significant number of conflicts over corporate respect for human rights in Indonesia. Over the past 5 years, 30% of the complaints received by the Indonesian National Human Rights Commission (*Komisi Nasional Asasi Manusia*/Komnas HAM or NHRI) have related to land. Conflicts are taking place in almost all 34 Indonesian provinces. The plantation, mining and forestry sectors are most affected by these conflicts. At the same time, however, together with the fisheries industry, these sectors remain vital to Indonesia, creating formal employment for over 37 million people or approximately 27% of the country's working population³¹ and amounting to approximately IDR 1,480.04 trillion or 10.89% of the country's GDP.³²

At their most severe, conflicts over land have resulted in the arbitrary arrest, detention and, in some cases, extrajudicial killing of Indonesian citizens failing to adhere to requests from private actors, including security agents acting on behalf of transnational corporations, to vacate their

³¹ Komnas HAM, Laporan Tahunan 2019, (2020), p. 5. Labour force total is taken from the World Bank data on the labour force in Indonesia. See: <https://data.worldbank.org/indicator/SL.TLF.TOTL.IN?locations=ID>.

³² Mining shared 43,13%, plantation 23,62%, while forestry 6,19%— and fishery 27,07%- of total contribution. Those four business sectors have created employment to 37,31 million people. Nota Sintesis Evaluasi Penyelamatan Sumber Daya Alam, KPK, (2018), 4.

premises. This form of human rights abuse, however, remains relatively rare. Based on the data analysed, since 2015, 55 persons have been killed as a result of land conflicts.³³

The abuses which are most prevalent in these sectors are: forced evictions, land-grabbing and the violation of the basic rights of indigenous peoples, including obtaining free, prior and informed consent (FPIC) from indigenous peoples prior to seizing lands to which they have customary title. Although violations against indigenous people are less prevalent in the NHRI data, this group remains particularly vulnerable to ongoing human rights abuses, given the long-term, systemic, ramifications that such risks place on the survival of these communities as a whole.³⁴

Key findings with respect to Land. Based on a preliminary assessment as outlined in this section, HRRC has identified the following human rights risks being the most severe and the most likely in relation to conflicts over land in which transnational corporations and other business enterprises have either been complicit or directly linked to such abuse (in order of priority):

- Land grabbing and forced eviction, resulting in the violation of the right to adequate housing;
- Unauthorized uses of land and boundary disputes, resulting in some instances in the criminalization of communities, and violations of their fundamental freedoms, particularly freedom of movement and the right to choose one's own residence;
- Pollution and environmental damage resulting in a failure to provide access to water, a violation of the right to adequate food; and
- Violations of the rights of indigenous persons.

Trends to watch:

A further aspect to consider is the effect that Indonesia's Job Creation Law (Law No. 11/2020 on Job Creation) will have on the lands and livelihoods of Indonesia's poorest and on its indigenous communities. HRRC predicts that, far from expanding Indonesia's industries in favour of job security and secure land title for Indonesia's working population, the Job Creation Law is likely to further exacerbate existing land disputes in these sectors and be of further detriment to Indonesia's indigenous peoples when attempting to exercise land rights.

2.1 Land conflicts

Land conflicts remain a prevalent source of corporate human rights abuses in both the plantation and forestry sectors of Indonesia's economy. Based on available NHRI data, in the most recent reporting period (2019) a total of 79 cases have been reported involving land conflicts of which 67% have been in the plantation sector, 25% in the mining sector, and 8% in the forestry sector. Land conflicts took place across a total area of 734.293,4 hectares,³⁵ and affected 109.042 families in 420 villages across almost every province in Indonesia.³⁶ The forestry sector contributes to the largest area of existing land conflicts (274.317,3 hectares). 95% of this area of conflict (261.997,2 hectares) involves TNC-OBEs holding industrial forest permits (HTI), which are in conflict with the communities' title to land. Conflicts over land in the plantation sector are

³³ KPA, Laporan Tahunan 2019, (2020), (note 30), 47-48.

³⁴ ICP, 'Human Rights and Conflict Escalation in West Papua' (ICP 2020) <<https://humanrightspapua.org/news/32-2020/538-new-report-on-the-west-papua-human-rights-and-conflict-situation-published-by-the-icp>>, 181.

³⁵ Komnas HAM, Laporan Tahunan 2019, (note 31), 23.

³⁶ *Ibid*, 3.

most prevalent in the palm oil sector, in which 82% of the total number of conflicts in this area are located (195.354 hectares).³⁷

According to the largest NGOs coalition working on land issues, the Consortium for Agrarian Reform (*Konsorsium Pembaruan Agraria/KPA*),³⁸ in 2019 the top three provinces where the largest number of land conflicts in Indonesia were located are: 1). West Java, 28 conflicts which are dominated by cases of infrastructure development (toll road, road), land cases involving plantation sector (private companies and State-Owned Enterprises [SOEs], i.e. PTPN VIII) and cases in the forestry sector (involving SOEs, i.e., Perhutani); 2). North Sumatera, 24 conflicts which are dominated by conflict involving plantation sector particularly palm oil (SOEs, i.e., PTPN II, and private companies), infrastructure (tourism-Lake Toba); 3). Central Kalimantan, 23 conflicts involving plantation sector (Palm Oil-private companies), mining sector and infrastructure development.³⁹

At present, Jambi is the location of the largest land conflict, with 270.086,9 hectares in dispute, followed by Sulawesi Tengah (73.445 hectares), Lampung (65.176 hectares), Sulawesi Tenggara (49.748 hectares), Kalimantan Timur (45.013,73 hectares), Aceh (43.658 hectares), and Riau (25.198 hectares).⁴⁰ Conflicts are likely to be further exacerbated in Indonesia by the Indonesian government's commitment to building infrastructure and promoting business in various underdeveloped provinces, such as Papua and West Papua.⁴¹

Palm-oil plantations: A crude awakening. The Agrarian Reform Consortium (KPA) notes that conflicts on palm-oil plantations have been the biggest contributor to the overall number of agrarian conflicts in Indonesia.⁴² This has been accompanied by a rapid rise in the number and area of palm oil plantations over the past 40 years, with the sector growing from 300,000 hectares in 1980 to about 11,6 million hectares in 2016. The Production of Indonesian crude palm oil also grew rapidly during this time: from about 700,000 tons in 1980 to 33, 5 million ton in 2016. In 2006, Indonesia replaced Malaysia as the world's largest producer of crude palm oil with a 54% share of world's production of CPO, outstripping Malaysia's share by 22%.⁴³

2.2 Land-grabbing and forced evictions

Land grabbing and forced evictions remain a primary human rights concern in the plantation, mining and forestry sectors. Customary land is frequently occupied by oil palm companies without obtaining local and indigenous communities' free, prior and informed consent (FPIC), forcing the

³⁷ KPA, Laporan Tahunan 2019, (2020), (note 31), 23-24.

³⁸KPA is a coalition of 153 peoples' (peasants, Indigenous, women, fisherfolk, and urban poor) organizations.

³⁹ KPA, Laporan Tahunan 2019, (2020), (note 31), 24-25

⁴⁰ Komnas HAM, Laporan Tahunan 2019, *op.cit* (note 31), 25.

⁴¹ELSAM, 'Threats and Violence: A Narrative of Human Rights Violations against Environmental Human Rights Defenders in Three Regions (North Kalimantan, Central Sulawesi and West Papua)' (ELSAM 2019) <<https://elsam.or.id/threats-and-violence-a-narrative-of-human-rights-violations-against-environmental-human-rights-defenders-in-three-regions-north-kalimantan-central-sulawesi-and-west-papua/>>.

⁴² KPA, Catatan Akhir Tahun 2019 Konsorsium Pembaruan Agraria "Dari Aceh Sampai Papua: Urgensi Penyelesaian Konflik Struktural dan Jalan Pembaruan Agraria ke Depan" (2019), 38, 46 and 23. KPA is a consortium of 153 member organisations.

⁴³ The Recent Development of Indonesia Palm Oil Industry, <https://gapki.id/en/news/18397/the-recent-development-of-the-indonesian-palm-oil-industry>.

people's removal from their ancestral homes.⁴⁴ In 2010, PT Ledo Lestari, an oil palm company, expanded its operations and moved all residents of the Semunying Bongkang community. The communities said that there had been no consultation process prior to the company taking action. The company put the families in 'company camps' scattered around the plantation. Forced evictions were involved in the relocation phase, when business representatives at the original village site destroyed the buildings by burning the house.⁴⁵

Land allocation to indigenous communities . Similarly , in October 2014 , the Forest Peoples Program (FPP) reported how the plan of Golden Agri Resources (GAR), a Singapore-based company which owns more than a quarter of a million hectares of Indonesian palm oil plantations operating under the Sinar Mas brand, to expand its plantations in eighteen of its subsidiaries in Borneo (Kalimantan -Indonesia) breached the Latest Plantings Protocol of the Roundtable on Sustainable Palm Oil (RSPO). FPP studies found that GAR has consistently breached the provisions of RSPO that lands can only be obtained with FPIC from indigenous peoples and local communities).⁴⁶ An NGO submission as part of the ESCR 2017 review also noted that land-grabbing has been exacerbated by the absence of well-conducted FPIC processes for centuries.⁴⁷ Since 2010, only 0.2 percent of forest estates had been allocated to indigenous communities.⁴⁸

Land grabbing is often justified as being part of the development process , and the government has harshly oppressed indigenous groups and others who oppose these actions.⁴⁹ In particular , the right to maintain access to existing water supplies necessary for the right to water, the right to food, the right to maintain access to water (increasingly recognised as a human rights responsibility by major transnational corporations) and the improvement of all aspects of environmental and industrial hygiene are all threatened by this form of dispute.

Types of land conflict . The data shows that land conflict manifests in several types of cases ranging from land grabbing (arbitrary takeover of the land), eviction and expulsion, as well as pollution and environmental damage (See Section 2.4 below). There are also many cases where development and extractive projects have resulted in conflicts between indigenous communities and TNC-OBEs.⁵⁰ The existence of judicial and non-judicial mechanisms are considered ineffective to remedy human rights abuses and settle conflicts. Several non-judicial mechanisms are set up by several institutions /ministries which are considered ineffective for remedy. ⁵¹ Thus, to address the root cause of land conflict effectively, a cross sectoral/ministries

⁴⁴Open Letter of 197 worldwide civil society organisations including Indonesian CSOs to EU Parliament, "palm Oil and Biofuel Reform, February 2015

⁴⁵ Angus McInnes, Forest People Program (FPP) and and FPP's Partners in In, Breaking the Heart of Borneo; A Plan to Plunder Borneo's Final Frontier, 45.

⁴⁶ Forest Peoples Programme complaint against Golden Agri Resources upheld, <https://www.forestpeoples.org/en/topics/agribusiness/news/2015/03/forest-peoples-programme-complaint-against-golden-agri-resources--0>, accessed on 24 Feb 2021. Sinar Mas is one of the largest conglomerates in Indonesia, with operations in the palm oil, banking, real estate and extractive industries.

⁴⁷ https://docs.google.com/document/d/1CtMjAb8N9JDXJrcK9qrtMG8B_eLbIAWq/edit, 5.

⁴⁸ INT_CESCR_CSS_IDN-16819_E, 13.

⁴⁹ https://docs.google.com/document/d/1CtMjAb8N9JDXJrcK9qrtMG8B_eLbIAWq/edit, 5.

⁵⁰ In July 20120, there was a conflict between an indigenous community and a company over the status of Bukit Sambung. Pg 14 INT_CESCR_CSS_IDN-16819_E

⁵¹Komnas HAM, Kertas Posisi Percepatan Penyelesaian Konflik Agraria dalam Kerangka Reforma Agraria Berspektif HAM, (2017/2018), 10.

institution which have an authority to settle land conflict, is needed⁵². To this point, Komnas HAM has argued that Indonesia needs an independent commission for agrarian conflict resolution.⁵³

2.3 Unauthorised use of land, boundary disputes (resulting from land reallocation) and the criminalization of communities

Apparatus often involved in land conflict which leads to violence experienced by affected communities and human rights defenders. In the last five years of NHRI-collated data, 1,298 farmers, indigenous peoples and human rights activists were criminalized by the police/other entities; 757 persons persecuted; 75 persons got shot; and 55 persons died. The police are involved in 100 cases of violence. Company security guards involved in 93 cases, while the military involved in 43 cases and Satpol PP (*Satuan Polisi Pamong Praja* or Municipal Police) personnel involved in 23 cases.⁵⁴

The police and military forces have historically played a large role in business activities. Although Law No.34/2004 law banned professional soldiers from being involved in business activities, NGOs are sceptical about the law's enforcement. Based on the data analysed, boundary disputes in Indonesia continue to be exacerbated by security forces, including local government forces working together with TNC-OBEs. Illustrative examples of this include:

- In 2013-2014, the military aided in the forced eviction and ill-treatment of a farmer in the Pinang Tinggi area as a result of a conflict with PT Asiatic Persada.⁵⁵
- In 2019, a land conflict involving farmers members of Serikat Mandiri Batanghari (SMB) and PT Wira Karya Sakti (PT WKS/subsidiary of Sinar Mas Group) located in Batanghari District, Jambi Province, Sumatra erupted. The conflict is located in the forest zone in which the forest area of Suku Anak Dalam (the local indigenous peoples) are living.⁵⁶ The conflict erupted as the farmers attacked the PT. WKS office. The root cause of the conflict, however, related to the overlapping right to cultivate land, granted to PT WKS by the government and the right to remain on the land granted to the farmers or Suku Anak Dalam.⁵⁷ The conflict led to arbitrary arrest and detention of farmers and the members of Suku Anak Dalam, including children, women and a pregnant woman.⁵⁸

With regard to the existing legislation, Law No. 41/1999 on Forestry is considered as the main cause of land conflict in Indonesia.⁵⁹ Based on this Law, the State has the authority to determine people's land as State Land (*Tanah Negara*) or State Forest Land (*Kawasan Hutan Negara*). Based on this determination, the ministers, governors, or head of district have legal authority to

⁵² Ibid.

⁵³ Ibid. See also Komnas HAM, National Inquiry on the Rights of Indigenous Peoples in Their Territory in Forest Zones, Summary Findings and Recommendations, *op.cit* (note 22), 6.

⁵⁴ *Ibid*, p. 39

⁵⁵ INT_CESCR_CSS_IDN_17094_E pg 6. For more on Law No. 34/2004, see: <https://www.hrw.org/news/2007/02/16/indonesia-reform-military-business>

⁵⁶ Komnas HAM, Laporan Tahunan 2019, *op.cit* (note 1), 93.

⁵⁷ KPA, Laporan Tahunan 2019, (2020), *op.cit* (note 3), 16.

⁵⁸ Komnas Perempuan, Siaran Pers Komnas Perempuan Merespon Konflik Batanghari, 11 September 2019.

⁵⁹ Noer Fauzi Rahman and Hasriadi Masalam, "The Trajectory of Indigeneity Politics against Land Dispossession in Indonesia" (2017) Sriwijaya Law Review.

grant the land for business entities by issuing permits (*izin*).⁶⁰ The process of determination of the forest zone and also issuance of permits for other parties including the business sector, however, takes place with a lack of consultation and also lack of transparency.⁶¹ This process has resulted in an arbitrary takeover of indigenous people's land, used by TNC-OBES to conduct operations on mining, plantation or logging further resulting in land conflicts.⁶²

2.4 Environmental damage

Environmental damage/pollution is another violation that corporate operations cause, contribute toward or are linked with, in Indonesia.⁶³ In particular, water pollution and its related effect upon community access to clean water remains an ongoing concern in several provinces.⁶⁴ A case in point is the palm oil plantation company, PT Ledo Lestari, whose operations have caused the loss of clean water by polluting rivers due to excessive use of pesticides. The impacted communities in Semunying Bongkang raised concerns that the company's operations caused an inability to meet subsistence needs due both to the scarcity of fish populations and the lack of farmland resulting from this pollution.⁶⁵ This indicates that the operations of corporations give an adverse impact to the right to water supplies necessary for fulfilment of the right to water of the communities and also the right to be free from arbitrary disconnections or contamination of water supplies.⁶⁶

The new provisions of Law No. 11 on Job Creation regarding the issue of the environment may also further exacerbate equality of opportunity for people to exercise their right to clean water.⁶⁷ Komnas HAM also identified that the pollution/environmental damage has been creating an unhealthy environment for the communities.⁶⁸ This suggests that the State of Indonesia does not take steps to improve all aspects of environmental and industrial hygiene as provided by Article 12(2)(b), ICESCR, including:

*“preventive measures in respect of occupational accidents and diseases; the requirement to ensure an adequate supply of safe and potable water and basic sanitation; the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health and the minimization of the causes of health hazards inherent in the working environment”, as mandated by the Covenant.*⁶⁹

Land conflict and its impact on rights and also the enactment of Law No. 11/2020 on Job Creation indicate that Indonesia is regressing in its steps *“to improve of methods of production,*

⁶⁰Ibid.

⁶¹KPA, Laporan Tahunan 2019, (2020), *op.cit* (note 2), 7.

⁶²Komnas HAM, National Inquiry on the Rights of Indigenous Peoples in Their Territory in Forest Zones, Summary Findings and Recommendations (2015), 18.

⁶³UNGP, Principle 13 states that: The responsibility to respect human rights requires that business: (a) avoid causing or contributing toward adverse human rights impacts when they occur; and (b) seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations.

⁶⁴ Laporan Tahunan Komnas HAM 2019, *op.cit* (note 1), 47.

⁶⁵ Angus McInnes, Forest People Program (FPP) and and FPP's Partners in Indonesia, Breaking the Heart of Borneo; A Plan to Plunder Borneo's Final Frontier, 45.

⁶⁶ General Comment No. 15: The Right to Water (Article 11 and 12 of the Covenant), para 10.

⁶⁷Ibid.

⁶⁸ Laporan Tahunan Komnas HAM 2019, *op.cit* (note 1), 47.

⁶⁹ General Comment General No. 14: The Right to the Highest Attainable Standard of Health (Article 12), para 15.

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” as guaranteed by the Article 11(2)(a), ICESCR). General Comment No.12 recognizes the state’s obligations not only to ensure that its ‘direct’ actions are compliant, but also those of non-state entities over which it has regulatory authority (paragraph 19)⁷⁰:

While only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society – namely individuals, families, local communities, nongovernmental organizations, civil society organizations, as well as the private business sector have responsibilities in the realization of the right to adequate food. The Indonesian State is therefore obliged to provide an environment that facilitates implementation of these responsibilities. According to the Committee on Economic, Social and Cultural Rights (CESCR), the private business sector—national and transnational—should pursue its activities within the framework of a code of conduct conducive to respect of the right to adequate food, agreed upon jointly with the Government and civil society.⁷¹

The lines, however, between compliance and violation remain difficult to assess: it can be challenging to say with any degree of certainty, other than on a case-by-case basis, whether or not TNC-OBEs have any obligations to respect the right to adequate food in this regard. Furthermore, even where such responsibilities exist, the State of Indonesia must make it clear both how and why these responsibilities should be met. For TNC-OBEs in Indonesia, the responsibility to respect such rights is likely to include doing no harm by preventing and mitigating adverse human rights impacts.⁷² This may include by engaging in processes which prevent environmental harm from occurring, including harms which directly impact upon the State’s obligations under Article 11, ICESCR.

2.5 The Rights of Indigenous Persons

The Indonesian Constitution recognizes the rights of indigenous communities to their customary lands, livelihoods and systems of law and government, but in practice, these rights have been routinely ignored and violated by government and industry.⁷³ In 2012, The Indonesian Constitutional Court produced a Decision No. 35/PUUX/2012 restoring the right of indigenous peoples to their customary land.⁷⁴ The implementation of this Decision, however, has been facing many challenges including the reluctance of the government to implement the Constitutional Court decision.⁷⁵ Thus, the United Nations and other experts noticed that little implementation of the decision has been made after six years of the decision.⁷⁶

⁷⁰Ben Saul, David Kinley, Jessica Mowbray, “Article 11: The Right to an Adequate Standard of Living” *The International Covenant on Economic, Social and Cultural Rights - Commentary, Cases and Materials* in Oxford Public International Law (OUP 2021), 864.

⁷¹CESCR, General Comment No.12 [20].

⁷²UNGP, Principle 19, (note 1).

⁷³Patrick Anderson, ‘Free, Prior and Informed Consent? Indigenous Peoples and the Palm Oil Boom in Indonesia’ in Oliver Pye and Jayathi Bhattacharya (eds) *The Palm Oil Controversy in Southeast Asia: A Transnational Perspective* (Asia-Europe Foundation Singapore 2013), 244.

⁷⁴Noer Fauzi Rahman and Hariadi Masalam, op cit. (note 19).

⁷⁵Refleksi Putusan MK 35: Sejauh Mana Kita Sudah Melompat?, AMAN, <http://www.aman.or.id/2018/07/refleksi-putusan-mk-35-sejauh-mana-kita-sudah-melompat/>.

⁷⁶Human Rights Watch, “When We Lost the Forest, We Lost Everything”, op.cit (note 6), p. 32

The International Coalition for Papua (ICP) has reported that ‘the presence of palm oil plantations had a strong impact on the food security of indigenous communities’.⁷⁷ ICP specifically reported that at least eight companies, most of which operate palm oil plantations, have ‘cleared forest areas and demolished sago hamlets between January and October 2018’.⁷⁸ Since sago is a staple food for Papuans; the loss of sago hamlets threatens Papuans food security.⁷⁹ Food security not only increases indigenous peoples’ risks for health problems, but also significantly reduces their productivity significantly.⁸⁰

Land cases reported to Komnas HAM also show the cause of the problem such as overlapping claims or disputes on the area boundaries and the considered “core” of land problems relating to the enforcement of the rights of indigenous peoples. The issuance of forestland release permits over the customary land of indigenous peoples (in addition to land that has been cultivated by farmers or communities) continues to be an ongoing source of problems pertaining to land rights.⁸¹ To date, remedies have largely remained forthcoming, as judicial mechanisms solely rely on written documents as evidence of ownership which many indigenous peoples cannot produce.⁸² This leads to arbitrary takeover of their land and arbitrary determinations by the state. The right to free disposal, of their natural wealth and resources as guaranteed by Common Article 1(2), ICCPR/ICESCR⁸³, is at the most risk.

2.6 Trends to Watch

The Impact of the Job Creation Law. The Job Creation Law’s 15 chapters and 186 articles take effect on 78 laws – either by amending (or deleting entirely) or enacting new provisions in Indonesia’s existing regulatory domains.⁸⁴ The Law covers 11 domains: namely (i) improvement of the investment ecosystem and business activities; (ii) Employment; (iii) Ease, protection, and empowerment of MSMEs-and cooperatives; (iv) Ease of business activities; (v) Research and innovation support; (vi) Land procurement; (vii) Economic zones; (viii) Central government investment and (ix) acceleration of national strategic projects; (x) Implementation of government administration; and (xi) Imposition of sanctions.⁸⁵ To implement the Law, the central government is required to issue more than 30 government regulations and other implementing regulations within the next 3 months.⁸⁶

With regard to the priority sectors HRRC has identified as predominantly involved in land conflicts, the Jokowi administration has identified fiscal incentives and streamlining licensing procedures

⁷⁷ ICP, ‘Human Rights and Conflict Escalation in West Papua’ (ICP 2020) <<https://humanrightspapua.org/news/32-2020/538-new-report-on-the-west-papua-human-rights-and-conflict-situation-published-by-the-icp>>, 181.

⁷⁸ Ibid.

⁷⁹ The impact of timber companies sand palm oil plantation on restricting indigenous people’s access to forest products for food sources and subsistence is noted in: https://docs.google.com/document/d/1CtMJAb8N9JDXJrcK9qrtMG8B_eLbIAWq/edit

⁸⁰ https://docs.google.com/document/d/1CtMJAb8N9JDXJrcK9qrtMG8B_eLbIAWq/edit, 8.

⁸¹ Komnas HAM, Laporan Tahunan 2019 (2020).

⁸² Komnas HAM, National Inquiry on the Rights of Indigenous Peoples in Their Territory in Forest Zones, Summary Findings and Recommendations, op.cit (note 16), 6.

⁸³ Indonesia is a party to ICCPR/ICESCR since 2005.

⁸⁴ Your Omnibus Guide, Assegaf, Hamzah and Partners (2020).

⁸⁵ Job Creation Law, Article 4.

⁸⁶ Investment Policy-UNCTAD, "Omnibus Law" on job creation has been enacted, <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3567/indonesia-omnibus-law-on-job-creation-has-been-enacted>.

as being key priorities in the mineral, coal, oil and gas industries. This includes integrating various types of licence into one form of Business Authorization for all sectors, the creation of fiscal incentives (0% royalty rate) provided to mining companies carrying out value-added activities in the Mineral and Coal sector and mandating the central government to conduct regulatory and supervisory duties in the Plantation sector. In the Forestry Sector, the effect of the Business Authorization permit procedure will be to streamline permits for business, environmental and conservation purposes into one centralized system integrated into a single licence. This ensures the consolidation of power and control over these industries by Indonesia's national government.

From a human rights perspective, the Job Creation Law stands to change the shape of environmental regulation and protection in Indonesia. There is now broad consensus that the effects of climate change are undermining and will continue to undermine the full enjoyment of human rights, and as such regulation of environmental protection has become a key concern, both nationally and internationally, when considering corporate respect for human rights. Several articles of the Job Creation Law stand to affect environmental protection vis-à-vis human rights. They are as follows:

- a) **Inadequate definition of relevant stakeholders.** Article 26 states that the process of assessing environmental impact, should be conducted with the participation of the people who are directly affected.⁸⁷ The Law, however, does not define “people who are directly affected”. This is considered reducing public participation. Thus, an NGO working for environment issues, the Indonesian Center for Environmental Law (ICEL) recommends this should be defined broadly: “... negative impact which is experienced by the people automatically also in the future.”⁸⁸
- b) **Stream-lining environmental permits and approvals (thereby concentrating power in centralized authorities and reducing public participation in these processes).** The Law also changes “the environmental permit” to “environmental approval” which is integrated into the business license (granted by the central government) and removes the existence of a Commission to assess environmental impact (AMDAL) which will be replaced by an Environmental Feasibility Assessment Team. As this also considered reducing participation of the public, ICEL recommended that the representative of potentially affected communities and/or community organizations should become a member of the Team.⁸⁹
- c) **Reducing requirements on the state to maintain forested areas.** The deletion of the requirement for the government to maintain 30% of the total forested area within each river basin or river watershed (*daerah aliran sungai*) and/or island in the Omnibus Law.⁹⁰

The Job Creation Law is intended to simplify regulation and other measures to ease doing business in Indonesia. From a human rights perspective, the effect of this measure, however, is questionable as the core problem related to “permit issuance” has not historically been associated

⁸⁷Law No. 11 /2020 on Job Creation.

⁸⁸ Komnas HAM, Kertas Posisi RUU Cipta Kerja dalam Perspektif HAM (2020), p. 9, see also ICEL, Setelah UU Cipta Kerja: Meninjau Esensi Partisipasi Publik dalam AMDAL, 21 December 2020.

⁸⁹ Article 21, 22 (3) Job Creation Law. Komnas HAM, Kertas Posisi RUU Cipta Kerja dalam Perspektif HAM, op. cit (note 21), 9.

⁹⁰ Law No. 11 on Job Creation. See also Tanggapan Kementerian Lingkungan Hidup dan Kehutanan atas Usulan RUU Omnibus Law “Cipta Lapangan Kerja” yang terkait dengan lingkungan hidup dan kehutanan pada Rapat Terbatas, (2019). See also Indonesia: Omnibus Law – Impacts on Environment and Forestry, <https://globalcompliancenews.com/indonesia-omnibus-law-impacts-on-environment-and-forestry-12102020/>.

with the policy on permit issuance, but the corrupt practices in the implementation of the policy.⁹¹ Hence, simplifying in the process of issuance and system without guarantee of transparency will likely only fertilize corrupt practices.⁹²

Increased Human Rights Due Diligence Obligations. In April 2020, the EU Justice Commissioner Didier Reynders announced that the European Commission would propose a law requiring corporations to undertake mandatory environmental and human rights due diligence in their supply chain and business networks by the end of 2021.⁹³ It has since committed to tabling the law by June 2021. Although an official law has not been drafted, it is likely that the proposed law would:

- 1) Apply to all EU companies and any non-EU company selling goods or providing services in the EU;
- 2) Require companies to implement human rights due diligence that cohere with those in the UNGPs to prevent adverse impacts on people; and
- 3) Contain sanctions for non-compliance.⁹⁴

In response to this and apart from the Job Creation Law, the Indonesian government is also promoting a voluntary human rights due diligence mechanism called PRISMA. Being developed by the Institute for Policy Research and Advocacy (ELSAM), several business groups, and the Law and Human Rights Ministry, PRISMA is a web-based application that aims to assess companies' operational risks related to human rights abuses. Covering several indicators, such as human rights policy, grievance mechanism, labour condition, environment and social responsibility, PRISMA is aimed at helping companies assess the risk of human rights abuses from their business operations.⁹⁵ Along with RSPO, this mechanism is perceived as a booster in helping Indonesian companies, such as in the palm oil industry, to increase presence in the foreign market that have stricter human rights standards like European Union.

Breakout Box - Case study 1 – Land

Human Rights Watch (HRW) documented land conflicts involving a plantation company, PT Ledo Lestari which operates in Semunying Jaya Village, Bengkayang Regency, West Kalimantan. The operation of the Company began in December 2004 when PT Ledo Lestari obtained a 20,000-hectare government planting and cultivation permit. This included the acquisition of 1,420 hectares of *adat* forest which *Iban Dayak* had used for generations. In 2005, the Company started clearing forests leading to widespread protests by members of the *Iban Dayak* as they said that they were not consulted by PT Ledo Lestari before it started

⁹¹ Komnas HAM, Kertas Posisi RUU Cipta Kerja dalam Perspektif HAM (2020), op.cit (note 22), p. 9

⁹² Hariadi Kartodihardjo, Korupsi Pembuatan Amdal, <https://www.forestdigest.com/detail/793/seluk-beluk-korupsi-penyusunan-amdal>.

⁹³<https://www.gibsondunn.com/mandatory-corporate-human-rights-due-diligence-what-now-and-what-next-an-international-perspective/#:~:text=In%20April%202020%2C%20a%20few,law%20requiring%20corporates%20to%20undertake>

⁹⁴ <https://www.lexology.com/library/detail.aspx?g=0171490e-fcc5-4a33-ad62-b60105ec206c>.

⁹⁵ Dzulfiqar Rahman, 'Govt develops web-based app to assess businesses' risks related to human rights' (The Jakarta Post 2020) <<https://www.thejakartapost.com/news/2020/10/06/govt-develops-web-based-app-to-assess-businesses-risks-related-to-human-rights.html>>.

its activities. This resulted in the involvement of the police. In 2006, the police arrested two village officials on criminal charges related to the protest and detained them for nine days at the Bengkayang Police Station. The communities put effort by approaching local authorities in the Bengkayang and West Kalimantan provinces to raise concerns about the continued expansion and operation of the company in 2006-2009. At the end of 2009, the local authorities in Bengkayang "inaugurate" a piece of forest in the area allocated to the company where the forest was still intact, which led communities to assume that their claims about the forest and land were acknowledged. In 2010, the company conducted talks with "heads of households" and resettled 32 Semunying households and compensated some families. The communities sued the Company and the Bengkayang Regency in District Court in 2014, objecting to the oil palm plantation and demanding revocation of licenses, return of their customary property, and compensation for damages suffered. In the year 2018, the court rejected the claim since the communities could not show to the court the government certificate for the community which explains that they are a recognised indigenous group entitled to customary land and forest. At the time of writing the HRW report, the communities intended to appeal the ruling.⁹⁶

3. PART THREE: LABOUR

Snapshot. Indonesia continues to be one of the most attractive emerging labour markets in Asia. Despite the severe impact of, and slow recovery from, the Asian Financial Crisis in 1998, Indonesia has shown itself to be a consistent performer within a volatile global economy.⁹⁷ In many respects, Indonesia demonstrates a distinct pattern followed by many newly industrializing countries (NICs) since the neoliberal turn in economics in the late 1970s: namely, rapid growth, growing foreign investment, industrialization and urbanization.

The Indonesian economy changed along with the gradual adoption of liberal economic policies, and this includes the nature of employment. While dominating during the Suharto era, the percentage of the workforce employed in agriculture is rapidly decreasing after *Reformasi*. Despite an ongoing allegiance to the traditional NIC growth patterns, the labour force now largely comprises a gig economy, based on short-term contractual arrangements and ongoing job insecurity.⁹⁸ Nevertheless, the agriculture sector (including forestry and plantation) and the industry sector (including manufacturing and mining) continue to form the two main sources of the traditional formal labour in Indonesia.

Key findings with respect to Labour. Based on a preliminary BHRIA as outlined in this section, HRRC has identified the following human rights risks being the most severe and the most likely in relation to labour in which transnational corporations and other business enterprises have either been complicit or directly linked to such abuse (in order of priority):

⁹⁶ Human Rights Watch, "When We Lost the Forest, We Lost Everything", 43-44.

⁹⁷ Roland Rajah, 'Indonesia's Economy: Between Growth And Stability' (*Lowyinstitute.org*, 2018) <<https://www.lowyinstitute.org/publications/indonesia-economy-between-growth-and-stability>>.

⁹⁸ Emma Allen, 'Analysis of Trends and Challenges in the Indonesian Labor Market' (2016) ADB Papers on Indonesia 16, 4 <<https://www.adb.org/sites/default/files/publication/182935/ino-paper-16-2016.pdf>>.

- 4) **Industrial relations disputes.** Along with the increasingly competitive environment for Indonesian industries and with weak government oversight, industrial relations disputes often greatly impact a wide number of laborers in Indonesia. The most frequently reported cases pertain to the termination of employment, dispute on wages, salary and other allowances, prohibition of the formation and activity and labour unions, and prohibition of strikes – a violation of labourers’ rights to fair and equal wages,⁹⁹ and to freely form and exercise their right to strike as part of that union, both of which are guaranteed by Indonesia under the ICESCR.¹⁰⁰

- 5) **Modern slavery (particularly in agriculture and fisheries).** Modern slavery has also been under the spotlight in Indonesia since the revelation of a slavery-like practices in an Indonesian fisheries in 2015 where migrant workers, mostly from Myanmar, were kept in cages, forced to work and often beaten and tortured. This human rights abuse is affecting the Indonesian commitment for upholding the freedom from slavery, including involuntary servitude and all forms of modern slavery (Article 8, ICCPR).

- 6) **Child labour (particularly in the agricultural sector).** Child labour in the agriculture sector also continues to be rampant, affecting millions of children in Indonesia.¹⁰¹ In about 80% of cases, child labourers are not paid, and 44% are exposed to hazardous conditions, such as dangerous objects and extreme temperatures¹⁰². Amongst child laborers aged 10-17, 60% of child labour is in the Agriculture industry, followed by the service industry (26%). In urban areas, ¹⁰³ this is affecting the Indonesian commitment for upholding the international prohibition on the worst forms of child labour (ILO Convention on the Worst Forms of Child Labour no.182). While Indonesian child labour laws are generally in line with international standards, poor enforcement of the law, particularly in the small-scale agricultural sector like tobacco farming, leaves children at risk from hazardous environments as well as impact on their right to education.

Trends to watch. There are several important labour trends in Indonesia. According to the Asia Development Bank, youth unemployment, skills shortages, and skills mismatches are persistent challenges for the Indonesian economy.¹⁰⁴ Furthermore, corporations’ lack of compliance with existing labour regulations continues to be a common problem, prolonging weak labour protections ‘on the ground’. This is despite the fact that, after *Reformasi*, Indonesia adopted various international human rights standards, including the International Covenant on Economic, Social and Cultural Rights (ICESCR) and reformed its labour law through Law No. 13/2003 on Manpower, Law No. 21/2000 on Trade Unions, and Law No. 2/2004 on Industrial Relations Disputes Settlement. Although the aim of these regulations is to give workers more labour protections, especially in respecting laborers’ dignity and rights as human beings, labour abuses still persist. Labourers who stage protests are often threatened by their employers. Cases of excessive overtime, unpaid social security and pension contribution, as well as underpaid wage remain common. Furthermore, asymmetric relationships between employers and labourers as well as weak government oversight contribute to the higher risk of labour rights abuses.

⁹⁹Article 7(a)(i), ICESCR.

¹⁰⁰Article 8(c) and (d), ICESCR.

¹⁰¹Concluding Observations on Committee on ESCR, 8, para 23.

¹⁰² Child Labor Roadmap 2022 ILO, 14.

¹⁰³ Child Labor Roadmap 2022 ILO, 13.

¹⁰⁴ Ibid.

3.1 Industrial Relations and the Right to Strike

Along with the increasingly competitive environment for Indonesian industries and ongoing reforms to reduce or streamline government oversight, industrial relations disputes often greatly impact a large number of laborers in Indonesia. Between 2017 and 2019, industrial relations disputes, especially in the form of termination of employment, dispute on wages, salary and other allowances, prohibition of the formation and activity and labour unions, and prohibition of strikes were the most frequently reported labour issues received by Indonesian National Commission on Human Rights.¹⁰⁵ In 2019, labour cases reported to Komnas HAM mostly came from DKI Jakarta.¹⁰⁶

While industrial relations disputes seem to be mundane, these issues are at risk of impacting on Indonesian commitment to international human rights standards, such as providing freedom of assembly, movement and association (Articles 12, 21 and 22, ICCPR) as well as guaranteeing the right to work and to just and favourable conditions of work (Articles 6 and 7, ICESCR). Most industrial relations disputes in Indonesia greatly impact labourers in two ways. First, with the weak social safety net system in Indonesia, industrial relations disputes create serious impacts for the victims. Despite the social safety net system is governed by law, such as Law No 40/2004 on the national social security system and Law No. 22/2011 on the implementing agency of social security, corporations still sometimes disregard this and leave their labourers without social safety nets, especially during and after industrial relations disputes. For instance, three hundred seven labourers were deprived of health access and social insurance after PT Smelting, which the majority of its stakeholder is owned by Mitsubishi Materials Corporation and Mitsubishi Corporation RtM Japan Ltd, decided to stop its labourers insurance premiums during the negotiation deadlock between the company and the labourer's association in 2017.¹⁰⁷ Second, strong asymmetrical relations between employers and labourers in Indonesia result in labourers having no option but to tolerate or accept exploitation, such as in fulfilling unrealistic targets or receiving unfair overtime payment. For instance, labourers were paid below the minimum wage and deterred from forming labour unions in the three palm oil plantations owned and operated by Indofood, the sole producer of PepsiCo-branded snack foods in Indonesia.¹⁰⁸ The labourers were often left with no option but to stay working under such conditions.

Out of various industrial sectors, HRRC notes that labourers in the mining, plantation, and apparel industries are most vulnerable to the risks of industrial relations disputes. These sectors are typically characterised by asymmetric relations between employers and labourers. The continuous abuse of labour rights is often exacerbated by weak government oversight and companies' refusal to engage with human rights due diligence.

¹⁰⁵ Komnas HAM, 'Laporan Tahunan KOMNAS HAM 2017' (Komnas HAM 2017), 'Laporan Tahunan KOMNAS HAM 2018' (Komnas HAM 2018), and 'Laporan KOMNAS HAM 2019' (Komnas HAM 2019).

¹⁰⁶ Laporan Komnas HAM 2019 (Komnas HAM 2019). See also Komnas HAM sebut tahun 2019 merupakan tahun suram penegakan HAM, <https://nasional.kontan.co.id/news/komnas-ham-sebut-tahun-2019-merupakan-tahun-suram-penegakan-ham>.

¹⁰⁷ Business and Human Rights Resource Centre, 'Indonesia: 307 workers left unable to access health and social insurance after PT Smelting stopped paying workers' premiums' (BHRRC 2021), <https://www.business-humanrights.org/en/latest-news/indonesia-307-workers-were-unable-to-access-health-social-insurance-after-pt-smelting-stopped-paying-workers-premium/>, accessed 25 February 2021.

¹⁰⁸ Rainforest Action Network, 'New Report Finds Ongoing Worker Exploitation, Poverty Wages, Toxic Conditions on Palm Oil Plantations Linked to PepsiCo, Nestlé' (RAN 2017) <https://www.ran.org/press-releases/new_report_finds_ongoing_worker_exploitation_poverty_wages_toxic_conditions_on_palm_oil_plantations_linked_to_pepsico_nestle/>.

Article 137 of Law No. 13/2003 and Article 8 of CESCRR guarantees labourers' right to strike. However, there are several instances in which individuals who have gone on strike have received employment termination, penalties, or attacked with force. The mining sector, specifically, is known to be prone to unfair termination of employment. In 2017, PT Freeport Indonesia, a mining company in Papua (as well as the province's largest employer), initiated a mass lay-off without negotiation with the labourers' union, to which the labourers responded with a series of strikes. As a result, 4,200 of those who participated in the strike were reported to have been fired by PT Freeport Indonesia. The non-negotiable termination of employment evicted labourers from their homes and denying them access to corporate hospitals and schools. Labourers' membership of government health insurance (*Badan Penyelenggara Jaminan Sosial* - BPJS) was discontinued by PT FI as those who participated in the strikes were considered to have voluntarily resigned. At least 15 labourers died after health benefits were cut because of participation in the strike.¹⁰⁹ Though on a smaller scale, termination of employment happened to labourers from other mining companies as well, such as PT Nusa Halmahera Minerals in the same year,¹¹⁰ PT IWIP/PT Weda Bay Nickel¹¹¹ and PT Gema Kreasi Perdana¹¹² in 2020.

Disputes on wages, salary, and other allowances are often seen both in the plantation industry and the apparel industry. Amnesty International's 2016 report investigated six palm plantations in Indonesia owned by Wilmar International Limited, PT Perkebunan Milano (Wilmar's subsidiary), PT Daya Labuhan Indah (Wilmar's subsidiary), PT Sarana Prima Multi Niaga (Wilmar's supplier), PT Abdi Budi Mulia (Wilmar supplier), and PT Hamparan Masawit Bangun Persada (Wilmar's supplier). The report has shown that while being the world's largest processor of palm and lauric oils and a member of Roundtable on Sustainable Palm Oil (RSPO), Wilmar and its palm oil suppliers have been applying an output-based approach in determining the labourers' wage. Labourers are obliged to achieve unrealistic targets in order to receive their payments, demanding labourers to do excessive physical work every day. This has caused several labourers to bring their children and spouse to help with work, causing not only the labourers' welfare to be threatened but also their children's.¹¹³

On the other hand, labourers in Indonesian apparel industry are also vulnerable to having their rights violated. ILO's Better Work program found that 35 percent of the factories it monitored in Indonesia did not comply with minimum wage rules and 76% of the factories did not pay social security and pension contributions as required under the law. In addition, overtime limits and accurate overtime wage payments regulated by Indonesian Labour Law are often violated. Unfair purchase prices that brands paid to factories are said to contribute to factories trying to cut costs by resorting to abusive labour practices.¹¹⁴

¹⁰⁹ International Coalition for Papua (ICP), 'PT Freeport Indonesia And Its Tail Of Violations In Papua: Human, Labour and Environmental Rights' (ICP 2020).

¹¹⁰Harwanto B. Pratomo, 'Penjelasan Perusahaan Tambang Nusa Halmahera Minerals Atas Aksi PHK Karyawan' (merdeka.com, 2017) <<https://www.merdeka.com/uang/penjelasan-perusahaan-tambang-nusa-halmahera-minerals-atas-aksi-phk-karyawan.html>> accessed 3 February 2021.

¹¹¹Yamin Fatiman, 'Pelaku Pembakaran Dan Perusakan Saat "May Day" Diduga Eks Karyawan Yang Di-PHK KOMPAS.com (2020) <<https://regional.kompas.com/read/2020/05/02/07090921/pelaku-pembakaran-dan-perusakan-saat-may-day-diduga-eks-karyawan-yang-di-phk?page=all>>.

¹¹²CNN Indonesia, 'Aktivitas Berhenti, 300 Pekerja Tambang Di Wawonii Kena PHK' (2020) <<https://www.cnnindonesia.com/nasional/20200213202823-20-474449/aktivitas-berhenti-300-pekerja-tambang-di-wawonii-kena-phk>>.

¹¹³Amnesty International, 'The Great Palm Oil Scandal' (Amnesty International 2016) <<https://www.amnesty.org/en/documents/asa21/5184/2016/en/>>.

¹¹⁴ Human Rights Watch, "'Paying For A Bus Ticket And Expecting To Fly": How Apparel Brand Purchasing Practices Drive Labor Abuses' (Human Rights Watch 2019).

3.2 Modern Slavery

Modern slavery has also been under the spotlight in Indonesia since the revelation of a slavery-like practices in an Indonesian fishery in 2015 where migrant workers, mostly from Myanmar, were kept in cages, forced to work and often beaten and tortured. TNC-OBE engagement in this human rights abuse amounts to a clear violation of the prohibition against slavery, including involuntary servitude and all forms of modern slavery (Article 8, ICCPR), now a norm of *jus cogens* in international law. Specifically, the risk of modern slavery is higher in the fisheries and agriculture sectors. The strong asymmetric relations between employers and labourers as well as the remoteness of working locations often pose a greater risk of this human rights abuse.

Labourers in Indonesian fisheries are often caught in abusive situations, underlying two essential risks. First, complex supply chains in the Asia-Pacific's fishery industries pose a big threat to labourers. The International Labour Organisation specifically reports that 'a string of recent reports indicate that forced labour and human trafficking in the fisheries sector are a severe problem.'¹¹⁵ Most foreign fishing companies, including those from China and Taiwan, operate in Asia-Pacific waters and sell their fish to East Asian countries, such as Japan. These fishing companies often employ migrant workers from Indonesia with bad working conditions.

For instance, Ari and Sepri, who are both Indonesian fishermen, died and were thrown overboard. It was revealed that they died whilst working on the same series of vessels owned by the Chinese company Dalian Ocean Fishing due to poor treatment and working conditions.¹¹⁶ This certainly signifies the risk of human rights abuses within the long chain of fisheries production in the Asia-Pacific.

Additionally, the lack of control and monitoring in the fisheries industry. Starting from the recruitment phase, fishermen in Indonesian vessels often find themselves caught in debt due to recruitment done by *calo* that charged them up to 2 to 3 million Indonesian rupiahs for recruitment fee. Unfortunately, because fishing is considered an informal sector, Indonesia has no specific regulation governing recruitment into this sector, including no limitations that can be charged to labourers in the recruitment process.¹¹⁷ Moreover, fishermen often get various working mechanisms. Some of them receive little to no information about their jobs and where they would be fishing in advance, and then having their identity documents taken once they started work. Moreover, fishermen on Indonesian fishing boats reported that they had substandard onboard living arrangements and extremely long work hours with minimal rest.¹¹⁸

When it comes to the payment process, payment in Indonesian fisheries is often made at the end of a trip based on profit made from catch, with deductions for expenses such as food, water, debt payments, and 'shared' business costs such as fuel and nets. These payment practices violate Indonesian law of Protection and Fisherman Empowerment that requires fishes to be paid 'regularly and on time'; a basic salary, overtime and/or waiting time, production bonus, and sailing

¹¹⁵ Sally Irwin, 'Fighting Forced Labour In Fishing - The Freedom Hub' (The Freedom Hub, 2021) <<https://thefreedomhub.org/blog/ending-modern-slavery/fighting-forced-labour-in-fishing/>> accessed 7 March 2021.

¹¹⁶ Greenpeace. 'Why are Indonesian fishing crews dying?' (Greenpeace 2020). <https://www.greenpeace.org/international/story/45068/indonesian-fishing-crews-dying/>.

¹¹⁷ Lisa Rende Taylor and others, 'Labour Risks in The Thai And Indonesian Fishing Industries: A Practical Guide For Responsible Sourcing' (Issara Institute 2019).

¹¹⁸ Ibid.

allowance.¹¹⁹ However, as surveillance is difficult at sea particularly for smaller vessels, abusive practices against fishermen might continue.

Komnas HAM conducted an investigation of alleged human rights abuse involving PT. Pusaka Benjina Resources (PT. PBR) in Benjina and Ambon, Maluku. Komnas HAM found the death of a number of crew members, many were found buried in the village of Benjina. In addition, the crew members work up to 22 hours and only rest for approximately 2 hours a day and night. Even when they are sick, they are forced to work and no leave and vacation which give adverse impact to their health and physical conditions. Komnas HAM found cells dedicated as a place of punishment for crew members who are considered disobedient or those caught trying to escape themselves from Benjina. It was also found that among the crew members are still underage when they were trafficked or smuggled from their countries.¹²⁰ Thus, the findings revealed human rights abuse among others human trafficking and smuggling, modern slavery/forced labour, poor work condition, salary below standard, child labour and working exploitation.¹²¹

The practice of modern slavery conditions also occurs in the context of labourers in the agricultural sector. The asymmetric relations between employer and labourers as well as the remoteness of some oil plantations in Sumatra and Kalimantan widen the opportunity for severe labourers' exploitation for commercial gain. According to a report from the Schuster Institute for Investigative Journalism, some palm oil plantations confiscated their labourers' national identification cards and other legal documents to prevent them from leaving the plantation.¹²² Moreover, laborers can often only access cash through loans, resulting in being trapped in a situation of false debt and being held captive by their employers.¹²³ This underscores the risk of severe labour exploitation within weak human rights control and monitoring in Indonesia.

3.3 Child Labour

Apart from the above-mentioned human rights abuses, child labour in the agriculture sector is also routinely a concern. According to Indonesian Child Protection Commission's data on child protection cases based on complaints and media observation, there were a total of 553 cases of child labour exploitation in 2011-2016.¹²⁴ This is affecting the Indonesian commitment for upholding the international prohibition on the worst forms of child labour (ILO Convention on the Worst Forms of Child Labour no.182).

The agricultural sector is shown to be the largest contributor for child labour in rural areas. According to the National Labour Force Survey done by the Central Bureau of Statistics in 2012,

¹¹⁹ Ibid.

¹²⁰ Komnas HAM, Laporan Tahunan 2015, 41.

¹²¹ Ministry of Maritime Affairs and Fisheries, IOM, Coventry University, Report of Human Trafficking, Forced Labour and Fisheries Crime in in the Indonesian Fishing Industry, 2016, 19.

¹²² Schuster Institute for Investigative Journalism, 'Forced Labor and Child Labor on Palm Oil Plantations' (Schuster Institute for Investigative Journalism 2013).
<<http://www.schusterinstituteinvestigations.org/#slavery-palm-oil-plantations-indonesia/cqcc>>.

¹²³ Ibid.

¹²⁴ Komisi Perlindungan Anak Indonesia, 'Data Kasus Perlindungan Anak Berdasarkan Lokasi Pengaduan dan Pemantauan Media Se-Indonesia Tahun 2011-2016' (Komisi Perlindungan Anak Indonesia 2016) <<https://bankdata.kpai.go.id/tabulasi-data/data-kasus-se-indonesia/data-kasus-perlindungan-anak-berdasarkan-lokasi-pengaduan-dan-pemantauan-media-se-indonesia-tahun-2011-2016>>.

80% of child employment for children in rural areas was absorbed in the agricultural sector. Meanwhile, the trade sector plays an important role in absorbing child labourers in the urban areas with as many as 39% of child labourers in urban areas are in the trade sectors.¹²⁵

While Indonesian child labour laws are generally in line with international standards, poor enforcement of the law, particularly in the small-scale agricultural sector like tobacco farm and palm oil plantation, leave children at risk from hazardous environment and its impact on their education. According to HRW (2016) report children of tobacco farmers often help their parents harvesting and processing tobacco. After handling the tobacco, these children showed acute nicotine poisoning, known as Green Tobacco Sickness, an occupational health risk specific to tobacco farming. While some children worked in tobacco farming only outside of school hours, some other children helped their parents during school time, especially during the harvesting season. In fact, some children also had dropped out of school in order to work to help support their families.¹²⁶ Moreover, according to Amnesty International, children as young as eight years old doing 'hazardous, hard physical work, sometimes dropping out of school to help their parents on the plantation' owned by Wilmar subsidiaries.¹²⁷

Child labour in the agriculture sector exists due to the industry's lack of human rights awareness and weak/limited government's oversight. For instance, all companies purchasing tobacco from Indonesia rarely conduct due diligence process on prohibiting hazardous child labour anywhere in the supply chain, including any work in which children have direct contact with tobacco in any form.¹²⁸ Indeed, in 2015, the Indonesian government published the Roadmap Towards a Child Labour-Free Indonesia as a commitment to eradicate child labour by 2022. Unfortunately, there has not been significant result from the government's effort to eradicate exploitative child labour, including the silence of the newly enacted Job Creation Law on this issue. Data shown by the Indonesian Central Bureau of Statistics reported that there was an increasing amount of child labourers from 1.2 million in 2017 to 1.6 million in 2019.¹²⁹ Weak law enforcement made it possible for child exploitation to happen in remote areas. Lack of resources provided for a proper inspection is pointed out as one of the factors causing the weak law enforcement in protecting children from exploitation. In some cases, corruption is said to hinder proper inspections as sometimes companies are given heads up prior to inspections.¹³⁰

¹²⁵ Minister of Manpower Republic of Indonesia, 'Roadmap towards a Child Labour Free Indonesia in 2022' (Minister of Manpower Republic of Indonesia 2015) <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-jakarta/documents/publication/wcms_377170.pdf>.

¹²⁶ Human Rights Watch, "'The Harvest Is In My Blood": Hazardous Child Labor In Tobacco Farming In Indonesia' (Human Rights Watch 2016) <<https://www.hrw.org/report/2016/05/24/harvest-my-blood/hazardous-child-labor-tobacco-farming-indonesia>>.

¹²⁷ Amnesty International, 'Palm Oil: Global brands profiting from child and forced labour' (Amnesty International 2016) <<https://www.amnesty.org/en/latest/news/2016/11/palm-oil-global-brands-profiting-from-child-and-forced-labour/>>.

¹²⁸ Human Rights Watch, "'The Harvest Is In My Blood": Hazardous Child Labor In Tobacco Farming In Indonesia' (Human Rights Watch 2016) <<https://www.hrw.org/report/2016/05/24/harvest-my-blood/hazardous-child-labor-tobacco-farming-indonesia>>.

¹²⁹ Ayu Andini and Nanang Syaifudin, 'Pekerja Anak Di Indonesia Masih Jauh Dari Nol' [2020] *Lokadata* <<https://lokadata.id/artikel/pekerja-anak-di-indonesia-masih-jauh-dari-nol>> accessed 25 February 2021.

¹³⁰ Laura Villadiego, 'Slow Progress In The Fight Against Child Labour In Indonesia' [2021] *Equal Times* <<https://www.equaltimes.org/slow-progress-in-the-fight-against?lang=en#.YDezT-gzbDd>> accessed 25 February 2021.

3.4 Trends to watch: Job Creation Law and its impact on labour regulation

The Omnibus law on Job Creation marked an important milestone in Indonesian labour regulations. While most Indonesian labour regulations after *Reformasi* adopted greater labour protections, the Omnibus law on Job Creation underlined the Indonesian government's stronger commitment for simplifying existing regulations and minimizing hurdles for business activities in Indonesia.

The final form of the Omnibus Law is deemed to be problematic for labourers as it impacts the right to just and favourable conditions of work.¹³¹ If applied, the law will affect at least 4 aspects concerning labourers' welfare:

1) **Minimum wage**, by eliminating inflation as a consideration in determining minimum wage, revoking the city/regency specific minimum wage, and allowing employers to apply an output-based wage system with unclear guarantee for minimum wage, under Articles 88C and D of the Law;

Although the Indonesian Constitution guarantees the right to fair and advantageous working conditions under Article 27(2) and Article 28-D (2), minimum wages were previously applied to labourers who had more than one year of work experience. However, several factors previously impacted whether labourers would even receive minimum wage after one year of employment. For example, the agreement to pay labourers minimum wage is usually agreed upon between labourers and unions, and employers, and is thus dependent on the strength and flexibility of the companies and unions.

2) **Employment status**, by eliminating the maximum period of temporary work agreement that automatically changes the status of temporary labourers to permanent labourers with social security benefits by revoking Article 59 of the Manpower Law (Article 89);

3) **Limitations on working hours**, by allowing employers to create a work period scheme to calculate the compensation based on the output units assigned to the labourers as a basis for calculating wages, as opposed to number of hours worked (Article 88B); and

4) **Paid leave**, by eliminating the obligation of employers to give payment for some forms of leave, including menstruation leave, leave for family reasons, parental leave, and religious holidays, as an addition to the 12-days of annual leave for labourers.¹³²

The overall impact of these provisions is to further exacerbate the conditions under which job security can be maintained in Indonesia's primary industrial sectors. Specifically, the elimination of Article 59 of the Manpower Law in the newly adopted Job Creation Law provides that temporary labourers will remain temporary for indefinite periods of time, exempting employers from their obligation to change the temporary status of labourers. The Job Creation Law also gives unclear direction on severance payment. The Job Creation Law requires employers to pay compensation for temporary labourers (after minimum working for 1 year) whose employment is terminated. However, it is unclear whether the compensation amount will be calculated based on the total working period that the temporary labourers have worked, or it will be a flat rate for all temporary

¹³¹Article 7, ICESCR.

¹³² Amnesty International, 'Commentary on the Labor Cluster of the Omnibus Bill on Job Creation (RUU Cipta Kerja)' (Amnesty International 2020) <<https://www.amnesty.org/en/documents/asa21/2879/2020/en/>>.

labourers, regardless of their different working periods. This is clearly an attempt to further generate the working conditions of a gig economy which, while likely to create job creation, will further exacerbate the already precarious conditions of many working in Indonesia's informal labour sector.

The Job Creation Law will also affect working hours, leisure, rest, and holiday. The Job Creation Law gives employers the discretion to create a work period scheme to calculate the compensation. This could disadvantage labourers in certain sectors as they could be required to work longer hours and receive lesser payment for overtime than labourers in other sectors. Moreover, the Law also eliminates some forms of leave where employers are obliged to give, such as menstruation leave, leave for family reasons (such as marriage, circumcision, baptism, or death of family members), parental leave, and religious holidays, as an addition to the 12-days of annual leave for labourers (Article 79). The lack of clarity on the right of labourers to paid leave in the Omnibus Law appears to be problematic. This will potentially force labourers to continue working to prevent any wage reduction or refrain from being sanctioned.

Indeed, the Indonesian government and CSOs are currently endorsing some initiatives to provide greater protection. For instance, Indonesian Migrant Workers Protection Agency started 'forming an investigation team to investigate the process of placing crew members working on the Chinese-flagged ship' and 'sending a letter to the National Police Headquarters to support the investigation process'.¹³³ However, the Ministry of Manpower has yet to issue any further regulations that could have protected migrant labourers in the fisheries industries.¹³⁴

Nevertheless, the situations faced by labourers are threatened to be worse during the COVID-19 pandemic. The COVID-19 impact has had a serious impact on the tourism, hotels, restaurants and manufacturing industries, which are key industries in Indonesia. Given that the number of furloughed and unemployed individuals in Indonesia is increasing as a result of the pandemic's economic impact, the International Labour Organization encouraged the Indonesian government to ensure social protections such as unemployment benefits, old-age benefits, sickness benefits, and survivor's benefits. Indonesia has launched the Pre-Employment Card (Kartu Pra-Kerja) as a result of the COVID-19 pandemic and is in the process of establishing greater employment insurance (JKP).¹³⁵

Breakout box - Case study 2: Roundtable for Sustainable Palm Oil

While being the world's largest processor of palm and lauric oils and a member of Roundtable for Sustainable Palm Oil (RSPO), Wilmar and its palm oil suppliers have been violating labourers' right to work and to just and favourable conditions of work (Articles 6 and 7, ICESCR); and the right to an adequate standard of living, including adequate food, clothing and housing (Article 11, ICESCR). According to Amnesty International, the target-setting system applied by the palm plantations risks labourers to work excessively in order to receive

¹³³ VOI 'Indonesian Crew Members In Taiwan Complain The Most, Not In China' (VOI 2020), <<https://voi.id/en/news/5670/indonesian-crew-members-in-taiwan-complain-the-most-not-in-china>>.

¹³⁴ Dian Septiari, 'Sailors' deaths highlight lack of legal protections for migrant workers' (The Jakarta Post 2020) <<https://www.thejakartapost.com/news/2020/05/10/sailors-deaths-highlight-lack-of-legal-protections-for-migrant-workers.html>>.

¹³⁵ https://www.ilo.org/jakarta/info/public/pr/WCMS_742021/lang--en/index.htm

their wage. This system also incentivises labourers to bring their children and spouses to help fulfil the given targets, risking some children to drop out of school to help their parents.¹³⁶

In addition to the excessive target setting system, female labourers are less likely to be promoted as permanent labourers despite having been working for the plantation for years. This practice denies them permanent employment and social security benefits, such as health insurance and pensions.¹³⁷ Global companies, such as Unilever and P&G, are sourcing from Wilmar's Indonesian operations. In addition to the government's lack of law enforcement, the companies' ignorance of Wilmar and its supplier's failure in upholding their labourers' rights are perpetuating the practice of human rights violations done in Wilmar's plantations.¹³⁸

4. PART FOUR: MONEY

Snapshot. Investment and the smooth operation of transaction and financial flows remain a key element in the health of Indonesia's economy, as well as being a key element of rapidly evolving international economic integration. Central to these elements is the manner in which the Indonesian government regulates foreign direct investment (FDI) and promotes and supports anti-corruption measures within industry. The former ensures that direct, stable and long-lasting links are created between economies and by extension, states. In the right policy environment, FDI serves as 'an important vehicle for local enterprise development, and helps improve the competitive position of the recipient country ('host') and the investing ('home') state.¹³⁹ The latter ensures that a comprehensive set of standards, measures and rules are applied in order to strengthen legal and regulatory regimes in Indonesia to fight corruption. Preventive measures and the criminalization of the most prevalent forms of corruption in both the public and private sectors continue to be key to ensuring that this fight can be won.

From a human rights perspective, however, both these areas of the law remain central to any understanding of how Indonesia's economy can flourish while taking into account the needs of the poor and those most vulnerable to human rights abuses - particularly in the business sector. With regard to FDI, Indonesia is currently in the process of renewing its bilateral investment treaties (BITs) with over 30 countries, having terminated these BITs in the aftermath of several unfavourable arbitral awards in the early part of the new millennium.¹⁴⁰ Throughout its review of the BITs process, Indonesia has acknowledged that some features of the existing BITs potentially expose serious risks to Indonesia's national interests.¹⁴¹ In particular, Indonesia has expressed concerns that previous BITs limited the policy power of Indonesia in terms of the government's

¹³⁶Amnesty International, 'The Great Palm Oil Scandal' (Amnesty International 2016) <<https://www.amnesty.org/en/documents/asa21/5184/2016/en/>>.

¹³⁷Ibid.

¹³⁸ Ibid.

¹³⁹ OECD, Benchmark Definition of Foreign Direct Investment (OECD 2008), 14, para 2. Available online at: <https://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf>.

¹⁴⁰ Caslav Pejovic and Juliartha Nugraheny, 'Revising Bilateral Investment Treaties as a new tendency in Foreign Investment Law: Indonesia and India in Focus' (2020) 17(2) Indonesian Journal of International Law 253, 262.

¹⁴¹Ibid., 265.

right to 'regulate issues that are of its national interests, such as the protection of health and environment'.¹⁴² Many of Indonesia's current proposed reforms in the area of BITs attempts to balance the government's right to regulate in the interests of maintaining Indonesia's permanent sovereignty over its natural resources against the rights of investors as stipulated in several provisions of the Investor-State Dispute Settlement procedures established by previous BITs.

Indonesia's recent re-opening of discussions with Japan regarding the countries' economic partnership agreement is in part an attempt to further advance security and defence interests between the two countries but also further to ensure greater cooperation between the two countries' industries. Prime Minister Suga's announcement of ¥50 billion in long-term, low interest loans to Indonesia, which has been hit hard by the coronavirus pandemic and suffers the highest number of infections and deaths in Southeast Asia, also suggests that closer economic cooperation can be expected in years to come.¹⁴³ In particular, Japan wants to see a change in Japan's policies with respect to canned fishery products from Indonesia amended so as to attract a 0% tariff, seeing as this would act as a win-win situation for both Japanese consumers and Japanese investors, who are investing heavily in the market.¹⁴⁴

At the same time, corruption depletes the sources of funding the Indonesian government has with regard to public spending and may prohibit the state from maximising 'its available resources, with a view to achieving progressively the full realization of the rights recognised in the International Covenant on Economic, Social and Cultural Rights'.¹⁴⁵ With regard to anti-corruption measures, bribery/corruption by companies in Indonesia often arise from central and local government regulations for licenses and levies. While being intended as a framework for managing public affairs and generating public revenues, government regulations are also being used as a source of indirect revenues in the form of rent-seeking behaviours. The practice of bribery/corruption is often amplified due to TNC-OBES' demand for faster and more favourable deals and public officials' low salaries. Local government in Indonesia is generally hampered by small revenues from formal sources; and utilising regulations has thus been a common practice for getting more income.¹⁴⁶ This is likely to only be further exacerbated by the Job Creation Law, which seeks to streamline investment processes further and remove power from the hands of local authorities.

¹⁴²Ibid., 266. See also *Churchill Mining Plc and Planet Mining Pty Ltd v Republic of Indonesia* ICSID Case No. ARB/12/14 and 12/40 award on 29 November 2016; *Nusa Tenggara Partnership B.V. and PT Newmont Nusa Tenggara v Republic of Indonesia*, ICSID Case No. ARB/14/15.

¹⁴³Reuters, 'Indonesia, Japan seek stronger security, economic ties in China's shadow' (October 20, 2020), available online at: <https://www.reuters.com/article/japan-southeastasia-indonesia-idUSKBN2751GE>.

¹⁴⁴Jakarta Post, 'Indonesia seeks to renegotiate trade, investment deal with Japan' July 20, 2020, available online at: <https://www.thejakartapost.com/paper/2020/07/19/govt-seeks-to-renegotiate-trade-investment-deal-with-japan.html>.

¹⁴⁵James Thuo Gathii, 'Defining the Relationship Between Human Rights and Corruption' (2006) 31 *University of Pennsylvania Journal of International Law* 125, 146 (citing the Office of the United Nations High Commissioner for Human Rights' Anti-Corruption conference).

¹⁴⁶Ari Kuncoro, 'Corruption and Business Uncertainty in Indonesia' (2006) 23 *ASEAN Economic Bulletin* 11; J Vernon Henderson and Ari Kuncoro 'Corruption in Indonesia' 10674 NBER Working Papers.

Key findings with respect to FDI and anti-corruption.

With regard to anti-corruption: based on the Institute of Economic and Social Research, University of Indonesia's (LPEM-FEUI) research reports, companies "spend on average over 10% of costs on bribes and over 10% of management time in smoothing business operations with local officials" in Indonesia.¹⁴⁷ However, the average corruption/bribe rate varies according to the size and economic sectors. For instance, corruption/bribe rates appeared to fluctuate across different business scales and sectors. Small firms pay "bribes less than smaller medium firms (10.4 percent versus 11.6 per cent), [but] larger medium firms pay less (9.6 per cent), and large firms pay the lowest rates of all (8.2 percent)"¹⁴⁸. The LPEM also reports that service-related companies in Indonesia tend to pay higher bribe rates than manufacturing companies (9.3 per cent) and agribusiness companies (10.3 percent).¹⁴⁹

Lembaga Survei Indonesia (LSI) reported a similar context. Around 23.4 percent of business owners interviewed by LSI stated that it is common/acceptable to give money, entertainment, or gifts as a kickback for expediting the administrative process and/or getting a bigger deal.¹⁵⁰

Location and the scale of cases. The extent of corruption varies enormously across local government jurisdictions, with, for example, "the average of bribes to costs ranging from 0.56% to 31% across localities" in the LPEM survey.¹⁵¹ Along with the decentralization process, local governments in Indonesia have greater control over its policies and regulations. Local governments with more limited formal revenues tend to use regulations as a tool for getting bribery/corruption. Politicians at regional and local level have been given greater powers over resources in their area, expanding the number of people able to benefit from corrupt practices. Decision-making processes have grown more political and local officials have more discretionary powers to issue permits for mining in exchange for bribery.

Trends to watch.

The Centralization of government authority may exacerbate (rather than alleviate) corrupt practices. In order to investigate, prosecute, and mitigate corruption/bribery practices, the Indonesian government created the Corruption Eradication Commission (KPK) especially through Law No 30/2002. Since 2019, however, KPK has operated through a new mechanism, especially with the adoption of the Law No. 19/2019. KPK transformed from an independent agency to a central government body, focusing on corruption prevention rather than eradication. According to the Law No. 19/2019, KPK leadership should be a subordinate to the President through a supervisory board and the Police Chief. KPK requests for surveillance also must be 'board-approved', limiting the independence of KPK's investigative powers.

New loopholes created through the Job Creation Law. The Job Creation Law has also been criticized for not being able to mitigate corrupt practices comprehensively. Instead, the Job

¹⁴⁷ *ibid.*

¹⁴⁸ Ari Kuncoro, 'Corruption and Business Uncertainty in Indonesia' (2006) 23 ASEAN Economic Bulletin 11, 16.

¹⁴⁹ *Ibid.*

¹⁵⁰ Lembaga Survei Indonesia. 2021. "Persepsi Korupsi dan Evaluasi Pemberantasan Korupsi Menurut Kalangan Pelaku Usaha dan Pemuka Opini". Lembaga Survei Indonesia http://www.lsi.or.id/file_download/183 .

¹⁵¹ J Vernon Henderson and Ari Kuncoro 'Corruption in Indonesia' 10674 NBER Working Papers, 1.

Creation Law is said to provide new loopholes for officials and businesses to commit bribery, especially for big industries. One of the examples of this occurs in the forestry related sector. Article 36 of the Job Creation Law amends Indonesian Forestry Law which previously required that all regions in Indonesia maintain a minimum of 30 percent of the area of watershed (DAS) and/or islands as forest area. Article 36 of the Job Creation Law scraps this requirement and instead leaves it up to the government in determining the amount of forest area will be sufficient to prevent environmental degradation and natural disasters.¹⁵²

4.1 Corruption and Bribery: The Legal Landscape

Corruption¹⁵³ remains one of the most prevalent risks faced by the Indonesian business and financial sector. The Corruption Eradication Commission (KPK) has recorded that nearly 70 percent of the cases it handled involved businesses, public officials and legislators. From 2004 to 2017, KPK has dragged 238 people from the private sector to court, placing them as the second biggest perpetrators of corruption in Indonesia with bribery as the most common crime.¹⁵⁴

The existence of corruption further aggravates the situation of land conflicts associated with the administration of Law No. 41/1999 on Forestry (see Section 2.2 above). KPK found 1,052 mining activity in forest areas without compliance to procedure determined by regulation in Kalimantan, Sumatera and Papua. In 2013, KPK conducted a study on the process of license issuance in the natural resources sector and found the practices of bribery and extortion in this process. This process is also further exacerbated by conflicts of interest. In the level of local and central business go hand-in-hand in high degree with politics resulting in the occurrence of conflict of interest and corruption. A widespread of illegal logging in Sumatera and Kalimantan, is an example, as public authorities issue many illegal logging permits.¹⁵⁵ KPK concluded that this process is part of state capture corruption. Bribery and extortion occurred in almost every line of administration -from planning to controlling). In the forestry sector, as an example, the bribery per license per year is 688 million -22 billion IDR.¹⁵⁶

4.2 Corruption and Bribery: Forestry Sector

The Forestry sector in Indonesia is significantly overseen by the KPK. In 2015, KPK initiated the National Movement on Saving Natural Resources (GNP-SDA/*Gerakan Nasional Penyelamatan Sumber Daya Alam*). The movement was made with the consideration that forestry is one of the

¹⁵² UU No. 11 Tahun 2020 tentang Cipta Kerja 2020.

¹⁵³UDHR 8, 17, 25 and 26

¹⁵⁴ Humas KPK, 'Embracing Corporations In Fight Against Corruption' (Komisi Pemberantasan Korupsi, 2021) <<https://www.kpk.go.id/en/news/highlights/889-merangkul-korporasi-melawan-korupsi-2>>.

¹⁵⁵ Indonesia Investments, Corruption in Indonesia, 23 June 2017, <https://www.indonesia-investments.com/business/risks/corruption/item235>, accessed on 26 February 2021

¹⁵⁶KPK, Annual Report, 2017, p. 19-21. See also Nota Sintesis Evaluasi Penyelamatan Sumber Daya Alam, *op.cit* (note 2), p. 4

sectors most prone to corruption.¹⁵⁷ Three aspects spotlighted by KPK are illegal logging, palm plantation, and mining.¹⁵⁸

In its 2017 report, KPK estimated that Indonesia lost approximately 35 billion rupiahs annually due to illegal logging.¹⁵⁹ According to Human Rights Watch's 2009 report, illegal logging in Indonesia has been filled with corruption at all levels. In 2006, it is reported that Indonesia has lost at least \$1.8 billion due to illegal logging. In HRW's 2013 update, it is estimated that illegal logging has caused the state to lose more than \$7 billion in five years since 2009.¹⁶⁰ In 2003-2006, Indonesian lost over \$5 billion from practices such as untaxed illegal logging, artificially low forest royalties, and illegal 'transfer pricing'. Meanwhile, the assessed forestry taxes do not even reach \$0.5 billion.¹⁶¹ In West Kalimantan, the average annual loss in government revenue reaches up to \$130 million despite the province still depending heavily on its forests, causing the local economy to struggle.¹⁶²

Meanwhile, weak oversight on permit issuance has caused Indonesia to potentially lose revenue of 15.9 billion rupiahs due to illegal mining in Indonesian forests. Namely, Kalimantan, Sumatera, and Papua have become the most vulnerable to illegal mining.¹⁶³ From 2003-2014, KPK estimated that Indonesia has lost 15.9 billion rupiahs from tax leakage and 28.5 billion rupiahs from lack of proper permit issuance and administration in the mining sector.¹⁶⁴

Growing recognition that corrupt licences in the forestry sector given to plantation firms are among the main underlying causes of Indonesia's deforestation, having widespread implications upon the State's capacity to meet both its environmental and human rights obligations. According to the United Nations Office of Drugs and Crime:

Forest fires are also common to clear peatlands and regularly cause haze crises in the country. In South-Sumatra Province, according to Greenpeace, deforestation has led to the destruction of the habitats of

¹⁵⁷ Komisi Pemberantasan Korupsi, 'Laporan Tahunan 2017: DEMI INDONESIA UNTUK INDONESIA' (Komisi Pemberantasan Korupsi 2018) <<https://www.kpk.go.id/id/publikasi/laporan-tahunan/937-laporan-tahunan-kpk-2017>> accessed 5 February 2021.

¹⁵⁸ Komisi Pemberantasan Korupsi, 'Laporan Tahunan 2017: DEMI INDONESIA UNTUK INDONESIA' (Komisi Pemberantasan Korupsi 2018). <<https://www.kpk.go.id/id/publikasi/laporan-tahunan/937-laporan-tahunan-kpk-2017>> accessed 5 February 2021; Komisi Pemberantasan Korupsi, "Laporan Tahunan 2019: Tak Sekadar Merangkai Simfoni" (Komisi Pemberantasan Korupsi 2020) <<https://www.kpk.go.id/id/publikasi/laporan-tahunan/1702-laporan-tahunan-kpk-2019>>.

¹⁵⁹ Komisi Pemberantasan Korupsi, 'Laporan Tahunan 2017: DEMI INDONESIA UNTUK INDONESIA' (Komisi Pemberantasan Korupsi 2018) <<https://www.kpk.go.id/id/publikasi/laporan-tahunan/937-laporan-tahunan-kpk-2017>>.

¹⁶⁰ Human Rights Watch, "'Wild Money' The Human Rights Consequences Of Illegal Logging And Corruption In Indonesia's Forestry Sector" (Human Rights Watch 2009) <<https://www.hrw.org/report/2009/12/01/wild-money/human-rights-consequences-illegal-logging-and-corruption-indonesias#8717>>.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Komisi Pemberantasan Korupsi, 'Laporan Tahunan 2017: DEMI INDONESIA UNTUK INDONESIA' (Komisi Pemberantasan Korupsi 2018) <<https://www.kpk.go.id/id/publikasi/laporan-tahunan/937-laporan-tahunan-kpk-2017>>.

¹⁶⁴ Komisi Pemberantasan Korupsi, "Laporan Tahunan 2019: Tak Sekadar Merangkai Simfoni" (Komisi Pemberantasan Korupsi 2020) at <<https://www.kpk.go.id/id/publikasi/laporan-tahunan/1702-laporan-tahunan-kpk-2019>>.

tigers, elephants, rhinos and orangutans; in one generation, 69% of the habitat of elephants of Sumatra has been destroyed, and the number of orangutans has reduced by 50% between 1999 and 2015.¹⁶⁵

Furthermore, the domestic consequences of lost government revenue and forestry sector mismanagement are far-reaching. The devastating impact of corruption and mismanagement on precious natural forests and the livelihoods of the country's rural poor who depend on these forests have been well documented, further exacerbating the inadequate response of the State to these concerns.¹⁶⁶

4.3 Corruption and Bribery: Mining Industry

Corruption/bribery is also rampant in the Mining Industry. Under Indonesian law, coal pits should be restored and replanted once they are no longer in use. However, TNC-OBEs routinely disregard these regulations, acting with impunity because of political ties and corruption between local government and the industry. Corruption allows companies to escape their responsibilities, not only failing to restore abandoned pits but failing even to produce guarantees, as required by law, that they have the funds to do so. According to a joint report between Greenpeace, Jatam, ICW, and Auriga, from 856 commercial coal mining license holders registered at the East Kalimantan Office of Mining and Energy, only 96 had deposited the funds needed to restore the mine once operations ceased.¹⁶⁷

4.4 Corruption and Bribery: Plantation Sector

In the palm plantation sector, KPK estimated that the loss of revenue that Indonesia experiences comes from tax leakage. In their 2019 annual report, KPK estimated that in 2003-2014 Indonesia has lost potentially 18.2 billion rupiahs. With potential tax collected from the palm plantation industry ranging up to 40 billion rupiahs, only 21.8 billion rupiahs was collected.¹⁶⁸

The weak tracking mechanism and weak effort in anti-corruption policy enforcement in Indonesian forestry sector risk wasted public access and major deviation of funds needed for public welfare necessities. As Indonesia still struggles to fulfil the citizens' demand for basic welfare protection, funds that could be used for Indonesia's welfare necessities are instead uncollected or into irresponsible individuals' pockets.

The severity of impact caused by corruption in Indonesia's forestry industry can be seen in West Kalimantan. In 2006, while the province's budget for health and education did not even reach 200

¹⁶⁵UNODC, "UNODC and KPK pilot a Corruption Risk Assessment in the Forestry Sector in South-Sumatra Province, Indonesia", 11 January 2019, at: <https://www.unodc.org/southeastasiaandpacific/en/what-we-do/anti-corruption/topics/32-unodc-and-kpk-pilot-a-corruption-risk-assessment-in-the-forestry-sector-in-south-sumatra-province-indonesia.html> .

¹⁶⁶Human Rights Watch, "Wild Money: The Human Rights Consequences of Illegal Logging and Corruption in Indonesia's Forestry Sector", 2006, at: <https://www.hrw.org/report/2009/12/01/wild-money/human-rights-consequences-illegal-logging-and-corruption-indonesias>

¹⁶⁷ Greenpeace, Jatam, ICW, and Auriga, *Shedding Light on Political Corruption in Indonesia's Coal Mining Sector* (Greenpeace, Jatam, ICW, and Auriga 2018), 4.

¹⁶⁸ Komisi Pemberantasan Korupsi, "Laporan Tahunan 2019: Tak Sekadar Merangkai Simfoni" (Komisi Pemberantasan Korupsi 2020) <<https://www.kpk.go.id/id/publikasi/laporan-tahunan/1702-laporan-tahunan-kpk-2019>>.

billion rupiahs accumulatively, the lost provincial revenue to illegal logging and unacknowledged subsidy had reached at least 1 trillion rupiahs in the same year.¹⁶⁹ This data shows that not only the state has potentially lost a lot of revenue due to the lack of mechanism and weak effort in anti-corruption policy enforcement in this sector, the citizens' rights for welfare might have been violated with the amount of funds wasted that instead could've been used for their basic needs.

4.5 Trends to watch

Breakout box: Case study 3 – Risky Riau

In 2014, Riau governor Annas Maamun was declared a suspect after being caught in an act of bribery in a red-handed operation (Operasi Tangkap Tangan) done by KPK in his house in Cibubur, Eastern Jakarta.¹⁷⁰

Annas Maamun was proven to have accepted bribe totalling US\$166,100 from Gulat Medali Emas Manurung, chairman of the Indonesian Palm Oil Smallholders Association/Asosiasi Petani Kelapa Sawit Indonesia (APKASINDO), and Edison Marudut, owner of PT Hokiana Triutama, to include a total of 2,522 hectare of land in the revision of proposed changes in the non-forest land in Riau. Annas was also proven to accept money gratification totalling 500 million rupiahs from Gulat to win PT Citra Hokiana Triutama in one of the province's Public Work Office/Dinas Pekerjaan Umum's projects.¹⁷¹

Along with Annas Maamun, KPK declared PT Palma Satu (a subsidiary of PT Duta Palma Group), Surya Darmadi (owner of PT Duta Palma), and Suheri Terta (Legal Manager of PT Duta Palma) as suspects.¹⁷²

PT Palma Satu, Surya Darmadi, and Suheri Terta were accused of bribing Annas Maamun an amount of 3 billion rupiahs to change the location of plantation owned by PT Duta Palma into a non-forest area, making it easier for the palm corporation to gain the predicate Indonesian Sustainable Palm Oil that can be exported abroad.¹⁷³

Annas was sentenced to seven years in prison with a fine of 200 million rupiahs. However, thanks to the clemency given by President Joko Widodo in 2019, Annas' prison term was reduced to six years. On September 21st, 2020, Annas was released from prison.¹⁷⁴

¹⁶⁹ Human Rights Watch, "'Wild Money' The Human Rights Consequences Of Illegal Logging And Corruption In Indonesia's Forestry Sector' (Human Rights Watch 2009) <<https://www.hrw.org/report/2009/12/01/wild-money/human-rights-consequences-illegal-logging-and-corruption-indonesias#8717>>.

¹⁷⁰ M. Rosseno Aji and Syailendra Persada, 'Perjalanan Kasus Annas Maamun Dari Tersangka Sampai Dapat Grasi' (*Tempo.co* 2019) <<https://nasional.tempo.co/read/1276859/perjalanan-kasus-annas-maamun-dari-tersangka-sampai-dapat-grasi>>.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

5 PART FIVE: CONCLUSION AND RECOMMENDATIONS

Japanese TNC-OBEs looking to, or currently engaged in, investing in Indonesia need to consider the best ways for their contribution to the Indonesian economy to remain cognizant of the reality of Indonesia's most vulnerable rights-holders. In keeping with best practices in the field of Business and Human Rights, this BHRIA has endeavoured to gather preliminary information on the key areas of impact that Japanese TNC-OBEs and their activities can have in Indonesia, looking in particular at the most severe and most irremediable rights abuses in key industries.¹⁷⁵

This BHRIA has endeavoured to gather information primarily with respect to the human rights context and the relevant stakeholders affected through desktop research. The core conclusions to be drawn from this report are as follows:

- ❖ The most egregious abuses being committed, in which TNC-OBEs can be seen to cause, contribute, or be linked to human rights violations, remain those conducted in the forestry, fishing, mining and plantation sectors in Indonesia. With respect to the violations being conducted, the key ones to note are:
 - The rights of indigenous persons (particularly with respect to land title)
 - Modern slavery
 - Child labour
 - Corruption, particularly in the forestry, mining and plantation sectors, but also with regard to business relationships more generally within Indonesia.

- ❖ **With regard to the rights of Indigenous Peoples:** stronger engagement by companies in ensuring Free, Prior and Informed Consent (FPIC) is both sought and obtained prior to projects being undertaken in Indonesia should be made a mandatory first step in the conduct of human rights due diligence. Although FPIC is by no means a panacea for land conflicts with indigenous persons in Indonesia, it provides an important avenue in the conduct of due diligence exercised by companies in key sectors to both mitigate and prevent adverse human rights impacts from occurring.¹⁷⁶ Japanese companies investing and operating in Indonesia are advised to consider FPIC an important and concrete first step toward mitigating conflicts with indigenous persons in Indonesia. This is in keeping with the private sector's move toward respecting the rights of the Ainu through forestry certification schemes in Japan - seen by some as more inclusive and better acknowledging the rights of indigenous persons under the United Nations Declaration on the Rights of Indigenous Peoples 2007 than the Japanese government's policies in this regard.¹⁷⁷

- ❖ **With regard to Modern Slavery:** TNC-OBEs globally are increasingly paying attention to both the causes and effects of modern slavery in their global supply chains, broadly defined as "the recruitment, transportation, transfer, harbouring, or receipt of persons by improper means (such as force, abduction, fraud, or coercion) for an improper purpose

¹⁷⁵ The Danish Institute for Human Rights, *Phase 1: Planning and Scoping - Human Rights Impacts Assessment and Guidance* (DIHR, 2020), 5.

¹⁷⁶For recent critique of this process, see in particular Colin Filer, Sango Mahanty and Leslie Potter, 'The FPIC Principle Meets Land Struggles in Cambodia, Indonesia and Papua' (2020) 9(3) *Land* 66.

¹⁷⁷Fumiya Nagai, 'Implementing the rights of Indigenous Persons in Japan: implementation and challenges of forest certification for the Ainu' (2019) 23 *International Journal of Human Rights* 249.

including forced labour or sexual exploitation.”¹⁷⁸ This is in keeping with legislation passed in several jurisdictions and mandated by regional and international organisations.¹⁷⁹ Labourers in Indonesian fisheries are often caught in abusive situations of modern slavery, underlying two essential risks. First, complex supply chains in the Asia-Pacific’s fishery industries pose a big threat to labourers. Second, the lack of control and monitoring in the fisheries industry leads to fishermen in Indonesian vessels finding themselves caught in debt due to recruitment done by *calo* charging heavy recruitment fees. Unfortunately, because fishing is considered an informal sector, Indonesia has no specific regulation governing recruitment into this sector, including no limitations as to the charged to labourers in the recruitment process. Japanese companies investing and operating in Indonesia are advised to consider legislative and treaty developments with regard to Modern Slavery as indicative of a growing awareness and concern with the rights of these most vulnerable workers, and to anticipate additional obligations relating to monitoring, reporting, tracking and mediating rights abuses in this regard in the future. Thought leaders and early adopters in this space are advised to integrate human rights due diligence processes that remain cognisant of modern slavery as a matter of urgency. This is also further in keeping with Japan’s promotion of measures for anti-human trafficking as part of its efforts to align government policy and legislative measures with the Sustainable Development Goals¹⁸⁰ as well as its commitment to abolish forced labour in Japanese legislation and its baseline study for the Japanese national action plan on Business and Human Rights.¹⁸¹

- ❖ **With regard to child labour:** while Indonesian child labour laws are generally in line with international standards, poor enforcement of the law, particularly in the small-scale agricultural sector (tobacco farming, palm oil plantations), leave children at risk from a hazardous environment and its impact on their education. Japanese companies are particularly at risk of causing, contributing or being linked to child labour in these industries. Child labour continues to be of concern throughout global supply chains, and has prompted legislative responses in The Netherlands¹⁸² and well as ongoing calls globally for TNC-OBEs to take action.¹⁸³ Japanese TNC-OBEs investing and operating in Indonesia should conduct due diligence in the form of monitoring, tracking, accounting for and reporting on their efforts to prevent all forms of child labour in their supply chains in Indonesia. However, such due diligence needs to further investigate the root causes of child labour in Indonesian industry, focussing in particular on practices which perpetuate the need for work to be ‘outsourced for children’, rather than merely punishing the

¹⁷⁸Defined by End Slavery. According to the United Nations, “There is no single definition of Modern Slavery. It is a dynamic, hidden and evolving challenge taking many forms, meaning that indicators of slavery and trafficking can vary from situation to situation. Taking a broad approach to human rights due diligence, including integrating children’s rights considerations, allowed us to identify some of these varied risks, indicators and take action.”

See: https://www.unicef.org.uk/wp-content/uploads/2018/05/TISC-Modern-Slavery-statement_2017-1.pdf.

¹⁷⁹See for example: Modern Slavery Act 2015 (UK); Modern Slavery Act 2019 (Australia); Convention on Trafficking in Human Beings 2008 (Council of Europe, 2008); PO29 Protocol 2014 of Forced Labour Convention, 1930 (International Law Organization, 2008).

¹⁸⁰Ministry of Foreign Affairs, Japan ‘Japan: The SDG’s Guiding Principles’ (22 December 2016), available online at: <https://globalnaps.org/wp-content/uploads/2018/08/japan-sdg-implementation.pdf>.

¹⁸¹2018 Baseline Study - Japan (note 2), 6.

¹⁸²Child Labour Due Diligence Act 2017 (Wet Zorgplicht Kinderarbeid), available online at: <https://zoek.officielebekendmakingen.nl/stb-2019-401.html>

¹⁸³

perpetrators.¹⁸⁴ This will involve moving beyond measures that claim simply to ‘fight poverty’ or ‘inequality’, thinking instead about the specific effects of both and the material instances of the same to which companies should be responding.

- ❖ **With regard to corruption:** Bribery in the forestry, mining and plantation sectors and their relations with administrative officials continues to pose risks to rights-holders in Indonesia, by channelling public and private resources toward ends which do little to assist the redistribution of wealth in favour of the country’s poor. Corruption in the mining sector, in particular, continues to form part of a global phenomenon: according to the OECD, 1 in 5 foreign bribery cases involve the extractives industry.¹⁸⁵ The International Monetary Fund has estimated that US\$1.5 - 2 trillion is lost to bribes every year - close to 2% of global GDP - and the mining sector continues to be a target industry for the IMF.¹⁸⁶ The intervention of public officials in determining the award of contracts of government projects to certain parties has resulted in a crisis of public trust in law enforcement in Indonesia.¹⁸⁷ The basic principles of criminal law and the commitment and integrity of government officials in implementing professional codes of ethics, and upholding honesty in order to achieve equitable law enforcement have all been challenged in recent times in Indonesia. According to Atikasari, Amira and Rifin, the abuse of power by government officials for the sake of business profit in public procurement has weakened Indonesia’s investment sector. In many cases, these activities may even lead to unfair competition in several trade and business sectors. While the government of Indonesia hopes to combat these tendencies through the centralisation of authority in the Job Creation Law, the centralization of authority and power that the Law looks to create may, in effect, have the opposite effect, unless properly maintained with the relevant transparency and accountability mechanisms in place to create balances and checks on officials’ power. Japanese TNC-OBEs investing and operating in Indonesia should be particularly mindful of the effects corrupt practices continues to have on business in-country, paying close attention to the manner in which the Job Creation Law streamlines processes for conduct of business and its implications as the Law is enforced.

Based on the findings of this report, the HRRC would recommend as follows:

- ❖ **To the government of Japan:** Japan continues to show leadership in the field of Business and Human Rights, with ongoing public support for responsible business conduct and taking the demands of rights-holders and those most vulnerable to human rights abuses remaining a core part of the government’s rationale for sustaining this mandate. However, stronger engagement with civil society, both in Japan and in Indonesia, with respect to the governments’ plans in this regard, may provide an avenue through which to ensure Japan

¹⁸⁴See in particular, Genevieve LeBaron, Neil Howard, Cameron Thybos and Penelope Kyritsis, ‘Confronting root causes: forced labour in global supply chains’ (University of Sheffield, 2018) available online at: https://eprints.whiterose.ac.uk/126167/1/Confronting_Root_Causes_Forced_Labour_In_Global_Supply_Chains.pdf.

¹⁸⁵OECD, ‘Corruption in the Extractive Value Chain: Typology of Risks, Mitigation Measures and Incentives’ (OECD 2016), 10 available online at: <http://www.oecd.org/dev/Corruption-in-the-extractive-value-chain.pdf>.

¹⁸⁶Transparency International, Accountable Mining Project, available online at: <https://www.transparency.org/en/projects/accountable-mining>.

¹⁸⁷Hartini Atikasari, Btari Amira, Ridwan Arifin, ‘Law Enforcement in the Practice of Bribery in Business and Trade in Indonesia: Between Theory and Practice’ (2020) 54(2) Atikasari 319.

remains a leader in Asia in this space. This can have important follow-on effects, geopolitically, with regard to the extent to which rightsholders in the region benefit, as well as Japanese TNC-OBEs resist the urge to assume short-termist thinking with regard to human rights problems. As the government itself has identified: the establishment of a liaison council to ensure implementation by the various ministries. There will also be discussions to support sustainable and effective implementation, including the development of indicators to measure progress and the design of NAP dissemination plans. While stakeholders have expressed praise for efforts made by the government, the disappointment over insufficient levels of CSO engagement during the NAP consultation and drafting process could be ameliorated by stronger engagement at implementation level, particularly in regard to TNC-OBE engagement in the supply chain in Indonesia. The government of Japan may also wish to engage civil society with respect to investors who, according to UNDP Japan, have been asking more and more for lectures on human rights, perhaps also reflecting a strengthening of interest in the ESG asset class which may have positive ramifications in this regard.

- ❖ **To Japanese TNC-OBEs.** A clear opportunity exists for Japanese companies to become early adopters and thought leaders in the Business and Human Rights space in Asia, and in Indonesia in particular. Companies can use their leverage in a variety of industries, particularly those named in this report, to further ensure the transparency, accountability and rigour of management in their global supply chains to maintain just practices and responsible business conduct. The conduct of human rights due diligence across supply chains will be key in this respect: companies should begin by considering the findings of this scoping document and engaging in further baseline assessments of how, individually, this may affect their operations and the implications for the conduct of business in Indonesia.
- ❖ **To civil society in Japan and Indonesia.** Engage further collectively and in coordination across different sectors and groups in pushing back against government reforms in Indonesia that may further exacerbate the tendencies for adverse human rights impacts (and, by extension, corporate human rights abuse) to occur in Indonesia. With regard to the Job Creation Law in particular: Due to limited advocacy and legal opportunities, civil society movements are not carried out in a collective manner but separately, based on the focus of each movement. For example, as of 20 November, the Constitutional Court has accepted 10 judicial review petitions submitted by individuals, trade unions, and a coalition of unions and NGOs to revoke the Omnibus Law, either partially or in its entirety. It is believed that efforts to revoke the Law must be part of a collective civil disobedience movement that conveys public distrust in the government, though this may inevitably be of greater detriment to rightsholders than improving their livelihoods, given the tendency of the state to resort to militarised solutions. In the absence of such a movement, civil society should further consider mobilising TNC-OBE support for securing better protections for workers and communities operating across the sectors identified in this report.
- ❖ **To scholars and think tanks, including the Sasakawa Peace Foundation.** Conducting secondary research, following up on these desktop findings remains crucial, if change is to be brought about in Indonesia. In particular, in line with best practices in the field of Business and Human Rights, further data collection and baseline development is required through qualitative analysis of industry-specific concerns and more in-depth interviews and engagement with processes on the ground in Indonesia. The HRRC strongly recommends that follow up be conducted in this regard.

