

PONTIANAK STATEMENT ON HUMAN RIGHTS AND AGRIBUSINESS IN SOUTH EAST ASIA

The 75 participants in this conference, drawn from the National Human Rights Institutions (NHRI) from South East Asia, UN Permanent Forum on Indigenous Issues, the Executive Office of the President, the Government of Indonesia and from supportive civil society, indigenous representatives and international organisations, including from Nepal, Bangladesh, Cambodia, Indonesia, Malaysia, Myanmar, the Philippines and Thailand, met in Pontianak in West Kalimantan, Indonesia, between the 11th and 12th October 2017, to consider ways of ensuring State and Non-State actors respect, protect, fulfil and remedy human rights in the agribusiness sector. The meeting included representatives from Golden Agri-Resources, Asia Pulp and Paper and Sime Darby. The meeting was hosted by the National Human Rights Commission of Indonesia (KomnasHAM), Pusaka and LinkAR-Borneo, with the support of the Forest Peoples Programme.

This meeting has been convened at a time when international concern about the human rights violations, land grabs and environmental destruction associated with the rapid expansion of agribusiness, especially in South East Asia, has reached new heights. New standards are emerging on the responsibilities of consumers, retail, manufacturers, traders and processors to trace their supply chains and ensure products do not embody malpractice. Discussions have begun at the UN on an international treaty on the extra-territorial obligations of host countries and transnational corporations. Civil society is drawing greater attention to corruption in land allocation for plantations and to the exploitation of workers, migrants, women and children on estates, and to the significant dangers faced by Human Rights Defenders working to secure community and indigenous rights.

A statement on behalf of the Governor of West Kalimantan welcomed the participants and noted that respect for human rights is essential to achieve beneficial outcomes from agribusiness expansion, while the vigilance of CSOs and national human rights institutions is needed to ensure that the rights of local communities are protected. A detailed review of Indonesia's legal reforms since the 1st Conference in Bali, in 2011, shows that despite some important legal precedents recognising indigenous and community rights to lands and forests, there remain major weaknesses in legal protections of communities' rights to food, to remedy, to FPIC and to land, and of the rights of workers and smallholders. Imposed Business Use Permits (HGU) extinguish community land rights. KomnasHAM receives more than a thousand complaints against businesses every year. In 2017, after a series of consultations, KomnasHAM finalized and launched a National Action Plan on Business and Human Rights, which sets out normative standards for both Government agencies and businesses to follow, which protect human rights and make remedy for abuses. KomnasHAM urges the Government to adopt this by Presidential Decree. The Chair of KomnasHAM noted that, without the protection of human rights, land development will leave only pain and suffering for future generations. The view was expressed that corporate interests dominate the State and this imbalance of power, places local communities in a very marginal situation.

Attention was focused on the rapid expansion of oil palm plantations in Indonesia, now totalling some 16.7 m ha. of which some 5 million ha. are in West Kalimantan alone. Insecure community land rights and the use of unclear language in land acquisition lead many communities to forfeit their lands for little gain. Returns from smallholdings, especially where these are managed by companies on behalf of farmers, are disappointing. Forests and fisheries are being destroyed. When deprived of livelihoods and lands, rural people are forced

into piece work on estates. Low wages mean parents are unable to afford to send their children to school and instead get them to work as child labour. Community protests are too often met with police violence and criminalization. Although stronger protections of human rights are needed, State policies favour infrastructure development and tolerance of past injustices.

In Malaysia, the National Human Rights Commission - SUHAKAM - has pursued its efforts to get the government to implement the recommendations of its National Enquiry on the Land Rights of Indigenous Peoples and its National Action Plan on Business and Human Rights. Both have been stalled and a Cabinet Working Group on Native Rights has met only once since it was set up in 2016. Efforts are underway to clarify the meaning of customary rights, after a Federal Court ruled that 'native customary rights' in Sarawak do not extend over all of indigenous peoples' customary territories, a decision already being used to defeat other cases in the State. On the ground, community representatives from Sarawak note that plantations are being developed without their consent, imposed by 'gangsters' and provide paltry benefits to those who have lost their lands. NGOs supporting communities are under increased surveillance. After being criticised for exploitative labour practices, the Federal Land Development Agency (FELDA) and FELDA Global Ventures (FGV) have withdrawn their operations from certification by the Roundtable on Sustainable Palm Oil. SUHAKAM is now advising FELDA on how to improve its human rights performance. Participants suggested this should extend to scrutiny of migrant workers' welfare and rights and FGV's overseas investments.

In Thailand, the interruption of the democratic process has created an unfavourable context for human rights, with the military-led government exercising its power under Section 44 of the 2014 Interim Constitution, bypassing state regulations on business, for example establishing special economic zones in ten provinces with land acquisition and the reclaiming of lands and forest. In pursuing its duties, the National Human Rights Commission of Thailand (NHRCT) has documented numerous human rights abuses and, based on its investigations, has made recommendations to the Government on how to improve rights protections in relation to indigenous and folk communities and lands, waterways management, workers in contract farming, stateless and undocumented migrants, human rights defenders, mining operations and extractive industries, coal power plants, special economic zones and Thai outbound investment. NHRCT is most concerned at the increasing use of Strategic Litigation Against Public Participation (SLAPP) suits against community rights defenders.

In Cambodia, which still lacks a national human rights commission, democratic processes are also being curtailed, with opposition politicians being arrested, facing judicial harassment and/or forced into exile. The NGO Equitable Cambodia, which has been pushing for remedy for communities suffering land grabs, has been suspended and faces possible closure. In this context, the struggle for adequate State protection of human rights from unscrupulous agribusiness will be a long one. There has however been more success using international fora to get redress for the communities whose lands were taken for the Koh Kong sugar estates, and in applying multilateral financing redress procedures.

In the Philippines, although there are no specific laws on agribusiness per se, the overall legal framework does place binding obligations on business while laws exist to protect agrarian reform beneficiaries and indigenous peoples. The Commission on Human Rights of the Philippines (CHRP) notes that there are numerous justiciable abuses of human rights notably

of agricultural workers and indigenous peoples. CHRP has just opened a National Enquiry on the Rights of Indigenous Peoples. Owing to bureaucratic inertia, the National Commission on Indigenous Peoples too often fails to uphold indigenous peoples' land rights and ensure robust FPIC procedures. Oil palm expansion is still being encouraged by the new government, especially in Mindanao and Palawan, but concerted actions by the Coalition Against Land Grabbing have resulted in a number of illegal operations being halted. Death threats and harassment of activists have ensued.

In Myanmar, the 2008 Constitution still deems all lands to be owned by the State. While land rights are provided for under the Farm Land Law and the Vacant, Fallow and Virgin Land Law, registration of plots is very onerous, and the laws do not prevent State acquisition of land – a situation particularly egregious in areas where people have moved due to conflict and return to alienated lands. There is no recognition of customary land rights, thereby facilitating expropriations. The Myanmar Human Rights Commission (MHRC) receives numerous complaints about land grabbing by agribusiness and after investigating specific cases has made recommendations to the government to restitute lands that have been unfairly taken and to strengthen community land rights protections. Current land acquisition processes are opaque, communities are given no prior notification and compensation is inadequate. In Karen State and other ethnic States, communities are suffering the impacts of expanding oil palm, teak and rubber plantations owned by foreign, national and military interests. Protests and conflicts are increasing. Communities and NGOs have responded by documenting abuses, filing complaints and supporting community mobilisation. There has been little response from the government and the situation is complicated by the incomplete nationwide ceasefire which was concluded in 2015.

The meeting notes that any progress in enforcing human rights through ASEAN must start from an acceptance of the universality of the rights enshrined in the main international human rights treaties, which the ASEAN Human Rights Declaration fails to do despite these treaties having been ratified by the majority of South East Asian governments. Furthermore, the meeting stresses the important of having NHRIs in every country in ASEAN and a regional human rights mechanism that can effectively address emerging trans-boundary human rights cases. The ASEAN Inter-Governmental Commission on Human Rights seems unable to play this role. Although the ASEAN processes are not yet open to considering indigenous peoples' rights, indigenous peoples are engaging in these forums to get change over the long term, joining with processes aimed at developing better norms on Social and Environmental Impact Studies, for example.

Preceding the two-day conference some 35 participants had also undertaken a fact-finding mission to the community of Olak Olak Kubu, in Kubu Raya regency, in West Kalimantan, where several villages - predominantly of Javanese transmigrants settled there by the government in the late 1950s and 1960s - had had their lands taken over for oil palm plantations by the Sintang Raya company of the Korean-owned Miwon Group. Even though community representatives had successfully secured a judgment from the Supreme Court, which ruled that the company's HGU was invalid, as the company had taken community lands without community consent, the local land office, administrative court and local government have prevented effective restitution. Subsequent protests have led to numerous villagers being jailed and criminalised. Four are still in jail. The communities are now split into those wishing to continue protests and those who feel continued resistance will only cause further problems.

After reviewing this information, participants called on Wilmar International, which buys palm fruits from Sintang Raya, to suspend purchases and investigate the situation. They urged the Provincial Government to intervene and ensure the HGU is suspended and the communities get their lands back. Moreover, they expect KomnasHAM to continue to document the on-going abuses and pressure the local authorities to cease harassing the communities.

A smallholder representative noted that in Sanggau, in West Kalimantan, lands continue to be taken without clarity or consent. Perhaps 1 or 2 out of 10 companies deal fairly with the local people. Smallholders' debt repayments are manipulated and the 'partnership' (*kemitraan*) schemes provide communities with uncertain returns and lack of clarity about how lands will eventually be parcelled out. Indigenous leaders note that lack of recognition of land rights puts leaders at a disadvantage when negotiating with companies. Community leaders are being bribed to favour the companies' interests. Laws are needed to recognize customary rights and communities need capacity building and government support to deal with companies. The validity of existing licences need to be reviewed and those in violation cancelled. While waiting for these reforms communities must use other avenues such as the World Bank Group and RSPO complaints procedures to get redress.

Presidential initiatives in Indonesia have been announced to distribute 9 m ha. of land through agrarian reforms and 12.7 m ha. of forests as social forestry. Indigenous peoples are to be prioritised. Actual targets are more modest and the administration lacks the budgets and expertise to achieve even this. A spokesperson for the private sector noted that many companies are adopting voluntary standards to maintain access to the European market. However, they face major challenges of traceability, especially from smallholders. Companies favour legal certainty to reduce risk and recommend decisive judicial processes to resolve land conflicts. It is very challenging for companies to adhere to voluntary standards that run ahead of the regulatory framework. Although alternative tenures might be viable – whereby companies lease or rent lands from communities for fixed terms – at the moment they have no option but to adhere to national laws. Currently HGU are mandatory. Banks would also have to be satisfied with rental agreements as collateral for making loans.

The Indonesian Directorate General of Plantations agreed there were many conflicts related to land and unrealised smallholding commitments. It's Climate Change and Conflict Resolution Office is seeking to mediate conflicts in certain provinces. Participants called for an end to the use of State security forces to quash community dissent. It was noted that indeed security forces enter concessions when requested by companies without considering their human rights obligations. Government statistics show at least 300,000 undocumented Indonesian workers in Malaysia most in the plantations sector. NGOs estimate many more. They are highly vulnerable to exploitation and rights abuses and risk being beaten up, fined and deported if they object. There are at least 43,000 stateless children in Sabah born to these 'illegal' workers. Investigation shows that major brands and traders like Ben and Jerry, Unilever, Procter and Gamble and Nestle buy oils from Wilmar International, which has been found to harbour serious labour abuses in its supply chain in Indonesia. Companies must improve their due diligence to prevent trading products derived from human rights abuse. The Ministry of Manpower is making efforts to monitor malpractice but local staff face redeployment at the insistence of local government leaders if they are too diligent. A new law designed to prevent poor labourers using their children to help achieve onerous piece-rate targets is before Parliament but lacks political support as it is considered 'toxic'. Legal enforcement is urgently needed but there also needs to be realisation that during any

transition period legal enforcement will create big problems especially for stateless children and their undocumented worker parents. However, despite efforts at inter-governmental dialogue, the Indonesian Government has a weak bargaining position in dealing with Malaysia, as its people need work and the remittances are a significant source of foreign exchange.

Participants pooled ideas and made the following recommendations.

- To overcome current obstacles to secure land tenure by communities: governments should adopt mechanisms accessible to indigenous peoples and local communities to map and register their customary lands. NHRIs should review current laws and practice and recommend reforms. The President of Indonesia should establish effective measures to implement the Constitutional Court decision of 2012 recognising customary forests as being outside State Forest Areas.
- In order to move to a new business model that does not require communities to surrender their lands to companies: policies and laws should be reviewed; in Indonesia, HGU should not be made mandatory; alternative community-based production models should be encouraged; there should be a moratorium on the hand-out of permits that overlap community lands and; the Government should revoke the permits of companies that violate human rights and legality.
- To make moratoriums effective, independent audits are needed of violations of human rights and of national policies, remedies must be undertaken by non-compliant entities and their performance reviewed before transparent reports are issued to the public, NHRIs and relevant state bodies.
- To ensure corporate accountability to achieve conflict resolution, companies should: adopt voluntary standards; adjust their operating procedures accordingly and; ensure grievance mechanisms are open and accessible to workers and communities. Governments should adopt international best practice standards that are consistent with international human rights laws and then monitor company compliance. NHRIs should also monitor performance.
- To prevent the use of forced and child labour on plantations, governments should: enforce the law effectively; provide education for all estate workers' children and; monitor the way laws are applied. NHRIs should: train companies in human and workers' rights; make recommendations to government on needed protections; set up monitoring systems and; collaborate to address the plight of stateless children.
- To address transboundary and regional human rights concerns, Governments should: through ASEAN give AICHR a stronger mandate to investigate such matters and; recommend AICHR set up an ASEAN Human Rights Tribunal or Court. Governments should not hinder NHRIs in carrying out their work. NHRIs should jointly: carry out transboundary enquiries and; report violations to human rights treaty bodies. The Governments of Laos, Cambodia and Vietnam should set up NHRIs.
- To maintain the impetus of this network, active collaboration should be maintained through: information-sharing; field visits; collaborative reviews and; wider use of the media to share their studies and findings, especially with relevant rights-holders.

In closing, KomnasHAM thanked the participants and NGO hosts for a very intense and productive meeting. It was announced that the Thai Human Rights Commission had kindly offered to host the next meeting.

Adopted by acclamation

12th October 2017

