

# **Bali Declaration**

## **on Human Rights and Agribusiness in Southeast Asia**

The international meeting of South East Asian Human Rights Institutions on '*Human Rights and Business: Plural Legal Approaches to Conflict Resolution, Institutional Strengthening and Legal Reform*' hosted by the Indonesian National Human Rights Commission (KOMNASHAM) was held in Bali, Indonesia, from 28<sup>th</sup> November to 1<sup>st</sup> December 2011. It was attended by 58 participants from the national human rights institutions of the Southeast Asian region, notable academics, representatives of indigenous peoples, as well as members of supportive national and international NGOs. The meeting focused on the challenges of ensuring respect for the rights of indigenous peoples and rural communities in the context of a rapid expansion of agribusiness, notably the palm oil sector, while recognising the right to development and the need to improve the welfare and situation of indigenous peoples and rural communities.

The participants expressed their thanks to the Indonesian Commission on Human Rights (KOMNASHAM), as represented by Ihdhal Kasim and Nur Kholis, Chairman and Vice-Chairman of the Commission respectively, for inspiring and hosting this meeting; and also convey their warm appreciation to SawitWatch, the Forest Peoples Programme, the Centre for Peoples and Forests, the Samdhana Institute and the Rights and Resources Initiative for co-organising and supporting this meeting. They welcomed the Statements of the UN Special Rapporteur on the Right to Food, Olivier de Schutter, and the Member of the UN Permanent Forum on Indigenous Issues, Raja Devasish Roy.

The International Conference adopted the following Declaration to be known as the:

### **Bali Declaration on Human Rights and Agribusiness in Southeast Asia:**

*Recalling* the inherent dignity, equal and inalienable rights of all human beings, the need for universal and effective recognition of human rights and fundamental freedoms, and the promotion of social progress and better standards of life in larger freedoms, as expressed in the Universal Declaration of Human Rights;

*Recalling* the universality, indivisibility, interdependence and interrelatedness of all human rights;

*Emphasising* the importance of respecting the collective rights of peoples and the development aspirations of people in developing countries, as set out in *inter alia* the UN Declaration on the Rights of Indigenous Peoples and the UN Declaration on the Right to Development;

*Taking account* of the Edinburgh Declaration which encouraged the International Coordinating Committee (ICC) of National Human Rights Institutions (NHRI) and individual National Human Rights Institutions to consider the practical functions they can fulfil in promoting enhanced protection against corporate-related human rights abuses, greater accountability and respect for human rights by business actors, access to justice for victims and establishing multi-stakeholder approaches;

*Welcoming* the UN Human Rights Council's continuing engagement with the business and human rights agenda, particularly through the Working Group on Human Rights and Transnational Corporations and Other Business Enterprises, which follows the work of the UN Secretary General's Special Representative on Human Rights and Transnational Corporations and Other Business Enterprises; the greater understanding and clarity about the appropriate roles and responsibilities of States and business with regard to human rights and the right of victims to access remedy emanating from the "Protect, Respect, Remedy" Framework;

*Recognising* that the right to food implies that States take measures to ensure the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within their own cultures and that access to such food must be achieved in ways that are sustainable and do not interfere with the enjoyment of other human rights;<sup>1</sup>

*Emphasising* the findings of the UN Special Rapporteur on the Right to Food which highlight the threat to the right to food from large-scale land investments and show that because of inequitable access to land and capital, smallholders and agricultural labourers make up a combined 70% of those who are unable to feed themselves today and recommend that States and the private sector adopt enforceable laws, policies and procedures that respect the rights of indigenous peoples and rural communities to their lands and livelihoods and protect the rights and interests of smallholders, workers and women;<sup>2</sup>

*Taking into consideration* the recommendations of the UN Permanent Forum on Indigenous Issues, which note the need for corporations to adopt special measures to ensure that their operations respect the collective rights of indigenous peoples, especially where national legal frameworks are deficient;<sup>3</sup>

*Recalling* the report of the UN Expert Mechanism on the Rights of Indigenous Peoples on 'indigenous peoples and the right to participate in decision-making' which stresses the importance of State parties ensuring that corporations respect the rights of indigenous peoples to give or withhold their free, prior and informed consent to operations that may affect their rights;<sup>4</sup>

*Noting with grave concern* the numerous reports from the UN, the World Bank, the International Finance Corporation (IFC), National Human Rights Institutions (NHRIs), the media and civil society organisations which show that accelerated investment and poor governance is leading to the ill-regulated expansion of agribusiness in the region, especially oil palm, which is: causing serious violations of human rights; prompting the massive takeover of indigenous peoples' and rural communities' lands without consultation or consent; provoking serious long term land conflicts and outbreaks of violence; leading to exploitative relations and other abuses of the rights of smallholders, migrants, workers, women, children, the elderly and detainees; the impoverishment of previously self-provisioning communities and peoples; and; leading to the destruction of forests and peatlands and high emissions of greenhouse gases.

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<sup>1</sup> E/C.12/1999/5, 12<sup>th</sup> May 1999

<sup>2</sup> A/HRC/13/33, 22<sup>nd</sup> December 2009

<sup>3</sup> E/C.19/2007/CRP.6, 7<sup>th</sup> May 2007

<sup>4</sup> A/HRC/18/42, 17<sup>th</sup> August 2011

*Recognising* the efforts of financial institutions, development agencies, investors and sectoral bodies to develop voluntary standards consistent with international norms to improve corporate performance, including the Food and Agriculture Organisation (FAO) ‘Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests’; the FAO, the International Fund for Agricultural Development (IFAD), the World Bank and the United Nations Conference on Trade and Development (UNCTAD) ‘Principles for Responsible Agricultural Investment that Respects Rights Livelihoods and Resources’; the ‘Farmland Principles’ of major global investors and; the Principles and Criteria of the Roundtable of Sustainable Palm Oil (RSPO);

*Considering*, however, that such measures must be complemented by actions by States to comply fully with their human rights obligations, including the right to food, the right of all peoples to freely dispose of their natural wealth and resources, and the right not to be deprived of the means of subsistence;

*Considering* that, while in the Americas there is a full functioning human rights system, including the Inter-American Commission and Court of Human Rights and that in Africa the African Union, African Development Bank and the Economic Commission for Africa have adopted a ‘Framework and Guidelines on Land Policy in Africa- a framework to strengthen land rights, enhance productivity and secure livelihoods’ consistent with the African Union’s ‘African Charter on Human and Peoples’ Rights’, in (Southeast) Asia there is lack of a dedicated regional human rights system or regional norms on land development;

*Acknowledging* that the majority of States in Southeast Asia have ratified the core human rights treaties and / or have constitutional and other national legal provisions, which recognise that custom is a source of rights, and these plural legal regimes need to be strengthened to give greater protection of rights;

*Concerned* by the lack of respect of peoples’ rights by corporations, the fact that in many countries indigenous peoples’ rights remain weakly recognised or unprotected and that government capacity to defend these peoples’ rights is lacking;

*Concludes* therefore that there is an urgent need for States in Southeast Asia to protect, respect and secure the rights of indigenous peoples and rural communities whose rights are being violated by agribusiness investment and the operations of palm oil corporations.

### **The Conference therefore resolves:**

To work with governments, legislatures and corporations in Southeast Asia to ensure that they take urgent steps to reform or reinforce national laws and policies relating to land tenure, agrarian reform, land use planning and land acquisition so that they comply fully with their countries’ human rights obligations, including the right to food, the right of all peoples to freely dispose of their natural wealth and resources, and the right not to be deprived of their means of subsistence.

We therefore recommend the following.

*Right to food:*

States need to accept that the right to food may be violated when people are denied access to land, fishing or hunting grounds, or are deprived of access to adequate and culturally acceptable food or by the contamination of food and water sources.

States therefore need to take measures to protect people's rights in land and allow land owners to decide on the use of their lands taking into account their own livelihoods and environments.

Recognising that peoples have diverse cultures and may relate to land in very different ways, States therefore have an obligation to respect collective property rights over lands, territories and resources, the right to culture and the right to self determination (including the right to pursue their own economic, cultural and social development)

States likewise have an obligation to protect certain activities that are essential to obtaining food (e.g. agriculture, hunting, gathering, fishing) and an obligation to provide or ensure a minimum level of essential food that is culturally appropriate.

*Land rights:*

In reviewing their land tenure regimes, national governments and legislatures need to review and revise or reinforce their national policies and laws on agricultural development and land acquisition to ensure that they respect the rights of indigenous peoples and rural communities and do not facilitate the denial of people's rights to food, to land and to free, prior and informed consent.

In revising their tenure systems, State should recognise that, while security of tenure is indeed crucial, individual titling, poverty eradication and the creation of a market for land may not be the most appropriate means to achieve it.

Instead, States should, where relevant strengthen, customary land tenure systems and review or reinforce tenancy laws to improve the protection of land users.

Drawing on the lessons learned from decades of agrarian reform, States must pay renewed attention to policies and procedures of land redistribution to ensure that they respect peoples' rights to food, livelihood, cultural identity and self-determination. These reforms must be accompanied by measures to support smallholder farmers, indigenous people, and women to promote food security.

Land development schemes/programmes/mechanisms/projects must be designed in ways that do not lead to evictions, disruptive shifts in land rights and increased land concentration in the hands of corporations.<sup>5</sup>

While many land development programmes and policies focus on areas considered to be 'empty', 'marginal' or 'degraded', States should recognize that there are few areas truly unoccupied or unclaimed, and that frequently land classified as such is in fact subject to long-standing rights of use, access and management based on custom. Failure to recognize such

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<sup>5</sup> Report of the Special Rapporteur on the Right to Food to the UN General Assembly A/65/281, 11<sup>th</sup> August 2010.

rights will deprive local communities and indigenous peoples of key resources on which their wealth and livelihoods depend.

*Free, Prior and Informed Consent:*

States must ensure respect for the right, of those with customary rights to lands and other resources, to give or withhold their free, prior and informed consent to operations planned on their lands. Such consent should be conveyed through their own freely chosen representative institutions. Any written agreements should be credible, transparent, fully implemented and agreed to by all parties involved.

Where rural communities have individualised rights in land through statutory law, land administration schemes, agrarian reforms and court decisions, all transactions in land should be regulated by impartial State agencies to ensure adherence to the ‘willing buyer/ willing seller’ principle.

States must exercise a Human Rights-based Approach (HRBA) to agribusiness expansion, limit the exercise of their power of eminent domain, and only forcibly acquire lands where: there is compelling justification in the national interest;<sup>6</sup> the gains expected are proportional to the losses; where sanctioned by previously existing law; where the development option is the least restrictive of human rights and; where such measures do not endanger peoples’ very survival.<sup>7</sup>

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent and after agreement on just and fair compensation and, where possible, with the option of return.

*Right to personal integrity and security:*

States must ensure that there is rule of law, humane treatment and a peaceful environment in agribusiness development areas, and must secure people against violence and arbitrary arrest and prohibit the use by agribusiness ventures of mercenaries, privately contracted police and para-militaries.

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<sup>6</sup> With reference to the plans of the Indonesian Government to establish a 1.8 m ha. palm oil plantation in the centre of Borneo, the UN Committee on the Elimination of Racial Discrimination recommended that: *State party should amend its domestic laws, regulations and practices to ensure that the concepts of national interest, modernization and economic and social development are defined in a participatory way, encompass world views and interests of all groups living on its territory, and are not used as a justification to override the rights of indigenous peoples, in accordance with the Committee’s general recommendation No. 23 (1997) on indigenous peoples* (UN Doc. CERD/C/IDN/CO/3 15th August 2007).

<sup>7</sup> According to human rights law, the term ‘survival’ must be understood as the ability of indigenous peoples “to preserve, protect and guarantee the special relationship that they have with their territory, so that they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected. That is, the term survival in this context signifies much more than physical survival.” See, inter alia, United Nations Human Rights Committee, *Angela Poma Poma v. Peru*, CCPR/C/95/D/1457/2006, 24 April 2009; Inter-American Court of Human Rights, *Saramaka People v. Suriname. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs*. Judgment of 12 August 2008. Series C No. 185; African Commission on Human and Peoples’ Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (February 2010).

*Smallholders and community options:*

States must also balance policies and laws which allow corporate investment in land development, with laws and policies which promote indigenous peoples' customary management systems, community-based initiatives and smallholders' participation.

To achieve this balance, States must take measures to ensure that smallholders: capture a fair proportion of the value of their products; are able to represent themselves through their own freely chosen representatives or organisations; are able to organise freely as cooperatives or other farmers' organisations to improve their access to capital, technical assistance and markets and; are able to choose the terms on which they agree or not to sell their produce to larger enterprises. Effective measures are also needed to identify and prohibit unfair practices and to reinforce the bargaining power of smallholders in order to equalize their relationships with the agribusiness sector. This can be achieved by prohibiting practices that constitute an undue exercise of buyer power and by combating excessive concentration in the food chain and abuses of dominant positions (including through competition regimes sensitive to excessive buyer power and competition authorities with effective complaints mechanisms).

Effective measures are also needed to avoid conditions conducive to debt slavery and other contemporary forms of slavery. Therefore, where companies provide credit, technical assistance and/ or markets for smallholders and workers, whether through contracts or informal arrangements, it is essential that there is full transparency and an absence of coercion in all transactions affecting smallholders and workers.

*Workers:*

States must improve the protection of local and indigenous agricultural workers by ratifying and fully complying with all ILO conventions and the ASEAN Declaration on the Promotion and Protection of the Rights of Migrant Workers relevant to the agrifood sector, and seeing these are implemented through national laws and regulations, and by ensuring that legislation sets a minimum wage.

*Women:*

In accordance with the principles of the Committee on the Elimination of Discrimination against Women (CEDAW), given that women are often disadvantaged in agricultural development schemes, States must take measures to combat discrimination and provide equal opportunities to women and strengthen women's access to, and control over, land while respecting family and other social networks, and cultural diversity and increase their participation in decision-making processes.

*Children:*

In accordance with the UN Convention on the Rights of the Child, States should adopt measures to ensure that children are; raised in a context of non-discrimination; have their best interests secured; afforded protection and opportunities for development, and; participate in all matters which affect them so that their views are taken into account, in accordance with the General Recommendation of the Committee on the Rights of the Child on indigenous children. States must take urgent action to recognise the rights of, and provide identity and support for, Stateless children born out of wedlock in plantations due to unjust laws which prevent plantations workers to marry.

*Dispute Resolution:*

Considering that protracted land disputes between expanding agricultural development projects and rural communities and indigenous peoples are prevalent throughout the region, there is an urgent need for strengthened dispute resolution mechanisms in line with international human rights standards, including the UN Declaration on the Rights of Indigenous Peoples.<sup>8</sup> As recommended by the UN Permanent Forum on Indigenous Issues, these should be tripartite processes which include indigenous peoples or rural communities, represented through their own freely chosen representative institutions and/or mediators and alternative dispute resolution mechanisms, the companies with which they are in dispute and government agencies with responsibility to regulate land issues.

*Access to Justice:*

Affected people also need access to justice and States must ensure the integrity and proper functioning of law enforcement agencies, courts and the independence of the judiciary. Due provision needs to be made for indigenous peoples to exercise their customary law, but also have access to effective conflict resolution mechanisms, including local and national courts where needed. States must ensure transparency and access to information, freedom of expression and freedom of assembly.

*Impact Assessments:*

States must also ensure that companies and investors carry out through public participation, publish and share with implicated parties participatory social and environmental impact assessments taking into account the Akwe:Kon Guidelines of the Convention on Biological Diversity;<sup>9</sup>

States must also strengthen their regulatory and monitoring mechanisms for land investments in agri-business through requiring human rights impact assessments. National Human Rights Institutions should develop robust systems both for assessing licences for agribusiness against human rights standards and for exacting sanctions.

*Right to Development and Human Rights:*

States must ensure that in taking steps to secure people's right to development,<sup>10</sup> they recognize that, in conformity with the 1993 Vienna World Conference on Human Rights, while development facilitates the enjoyment of all human rights, the 'lack of development may not be invoked to justify the abridgement of internationally recognized human rights'.<sup>11</sup>

*Ratification of Human Rights Instruments:*

States must ratify all relevant international human rights treaties and relevant optional protocols, and take steps to harmonise them with domestic laws.

Adopted by acclamation in Bali, 1<sup>st</sup> December 2011

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<sup>8</sup> It is a norm of international law that violations of human rights give rise to a right of reparation for victims, which may include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition (Theo Van Boven, 1993, *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, Final Report 1993 in UN doc. E/CN.4/Sub.2/1993/8.

<sup>9</sup> The Akwe: Kon Guidelines may be found at <http://www.biodiv.org/doc/publications/akwe-brochureen.pdf>

<sup>10</sup> *UN Declaration on the Right to Development*. UN Doc. A/RES/41/128 4th December 1986

<sup>11</sup> *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights on 25th June 1993, Part I, at para. 10. UN Doc. A/CONF.157/23, 12th July 1993.