

4-30-2021

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Recommended Citation

Prinhandono, Iman; Hosen, Nadirsyah; and Boom, Kelly (2021) "KOMNAS HAM'S HUMAN RIGHTS JURISDICTION OVER BUSINESSES INVOLVED IN THE HAZE CRISIS," *Indonesia Law Review*: Vol. 11 : No. 1 , Article 4.

DOI: 10.15742/ilrev.v11n1.692

Available at: <https://scholarhub.ui.ac.id/ilrev/vol11/iss1/4>

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KOMNAS HAM'S HUMAN RIGHTS JURISDICTION OVER BUSINESSES INVOLVED IN THE HAZE CRISIS

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Article Info

Received : 29 December 2020 | Received in revised form : 03 February 2021 | Accepted : 09 March 2021

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Abstract

Indonesia's forest fires have caused a serious haze problem nationally and in the Southeast Asian region, which has caused harm to the rights to life, health and a healthy environment, work, education, and many others. The forest fires largely stem from harmful slash-and-burn methods of land clearing, done at large scales by corporations. Judicial mechanisms have proven ineffective to deter violating corporations and bring justice to victims. From a legal standpoint, Komnas HAM's quasi-jurisdictional powers allow it to act as a non-judicial grievance mechanism for victims in the haze crisis and against violating corporations. However, issues with the non-binding nature of its reports and mediation, inability to compel violating corporations to participate in its investigation and mediation, as well as declining trust in Komnas HAM's integrity may prove to be significant barriers to the effective exercise of jurisdiction and the provision of effective remedies to victims. Komnas HAM and ELSAM's national human rights plan, issued in 2017, is a step in the right direction. However, further steps are required from a legislative standpoint to broaden Komnas HAM's mandate for it to effectively perform its functions, in the haze crisis and beyond.

Keywords: haze crisis; human rights; komnas ham; non-judicial grievance mechanism

Abstrak

Kebakaran hutan di Indonesia telah menyebabkan masalah kabut asap yang serius secara nasional dan di kawasan Asia Tenggara, yang telah melanggar hak asasi manusia untuk hidup, kesehatan dan lingkungan yang sehat, pekerjaan, pendidikan, dan banyak lainnya. Kebakaran hutan sebagian besar berasal dari metode tebang-dan-bakar yang dilakukan dalam skala besar oleh perusahaan untuk membuka lahan. Mekanisme peradilan terbukti tidak efektif untuk mencegah korporasi yang melanggar dan memberikan keadilan bagi korban. Dari sudut pandang hukum, kewenangan Komnas HAM memungkinkannya untuk bertindak sebagai mekanisme pengaduan non-yudisial bagi korban dalam krisis kabut asap dan melawan perusahaan yang melanggar. Namun, sifat laporan dan mediasi Komnas HAM yang tidak mengikat, ketidakmampuan Komnas HAM untuk memaksa perusahaan pelanggar untuk berpartisipasi dalam penyelidikan dan mediasinya, serta menurunnya kepercayaan masyarakat pada integritas Komnas HAM dapat menjadi hambatan yang signifikan bagi pelaksanaan yurisdiksi dan penyediaan pemulihan yang efektif bagi korban. Rencana HAM Nasional Komnas HAM dan ELSAM, yang dikeluarkan pada tahun 2017, merupakan langkah ke arah yang benar. Namun, diperlukan langkah lebih lanjut dari sudut pandang legislatif untuk memperluas mandat Komnas HAM agar dapat menjalankan fungsinya secara efektif, dalam krisis kabut asap dan kasus-kasus lainnya yang melibatkan korporasi.

Kata kunci: krisis kabut asap; hak asasi manusia; komnas ham; mekanisme pemulihan non-yudisiil

I. INTRODUCTION

Indonesia's forest fires, caused by extensive slash-and-burn policies, have caused serious national and trans-national air pollution in the Southeast Asian region since the late 1990s. The "haze", as the pollution is often called, originates from the islands of Kalimantan, Sumatra, and Riau, where large swathes of land are covered in forest.¹ Local inhabitants of the islands had used slash-and-burn as a traditional method of land-clearing, but the haze problem originated from the method's use by large corporations for large-scale plantations, especially for palm oil. The haze lasts annually between June and October, during Indonesia's dry season.²

International attention was brought to the phenomenon following a particularly severe episode in 1997/1998, exacerbated by the El Nino Southern Oscillation.³ Attempts have been made by ASEAN Community and the Indonesian government to address the issue, including the legally binding 2002 ASEAN Agreement on Transboundary Haze Pollution which obliges member states to prevent, monitor, and mitigate transboundary haze. Nonetheless, these measures have been criticized as ineffective, with Mudiyarso et al⁴ pointing out that they failed to address the causes of fire, namely: 1) the inappropriate use of fire as a tool to clear land, 2) destructive and inefficient logging practices, 3) unfairness in the system for planning and allocating use rights to forests which causes poor site selection for large-scale agriculture and settlement projects, 4) questionable land development strategies promoting rapid deforestation, and 5) the lack of an effective international environmental regime.⁵

These problems persist today. In September 2019, the Air Quality Index in Palangkaraya, Kalimantan reached a level of 2000, far exceeding the threshold for hazardous air quality between 301 and 500.⁶ The cause of the haze, on the other hand, began to fragmentize. Fires post-2010 occur in a higher proportion in non-concession areas, caused by small and medium-scale palm oil plantations and palm oil smallholders.⁷ Nonetheless, concession areas still constitute significant hot spots, with Purnomo et al⁸ showing that it makes up 47% of hot spots. Local politics in Sumatra and Kalimantan, in particular, play a significant role, with local politicians participating in land transactions to garner support and using fire to cheaply clear and increase land value.⁹ Local elites receive as much as 68% of the revenue from these lands, transactions and work together with burners and local elites who administer land documents to form an intricate network that influences decision-making at

¹ Md Saidul Islam, Yap Hui Pei, and Shrutika Mangharam, "Trans-Boundary Haze Pollution in South-east Asia: Sustainability through Plural Environmental Governance," *Sustainability* 8 (May 2016): 3.

² Islam, Pei, and Mangharam, "Trans-Boundary Haze Pollution," 3.

³ Luca Tacconi, "Fires in Indonesia: Causes, Costs and Policy Implications," *CIFOR Occasional Paper* (2003): 4.

⁴ Daniel Mudiyarso et al., "Policy Responses to Complex Environmental Problems: Insights From a Science-Policy Activity on Transboundary Haze From Vegetation Fires in Southeast Asia," *Agriculture, Ecosystems and Environment* 104 (2004): 13.

⁵ Mudiyarso et al., "Policy Responses," 13.

⁶ "Indonesia Haze: Why Do Forests Keep Burning?," BBC, accessed October 18, 2020, <https://www.bbc.com/news/world-asia-34265922>.

⁷ Helen E.S. Nesadurai, "ASEAN Environmental Cooperation, Transnational Private Governance, and the Haze: Overcoming the 'Territorial Trap' of State-Based Governance?" *TRANS: Trans-Regional and -National Studies of Southeast Asia* 5, no. 1 (January 2017): 121-145.

⁸ Herry Purnomo et al., "Forest and land fires, toxic haze and local politics in Indonesia," *International Forestry Review* 21, no. 4 (2019): 26.

⁹ Purnomo et al., "Forest and land fires," 26.

district, national, and regional levels.¹⁰

Palm oil agriculture plays a significant role in the haze and is itself directly associated with environmental and health issues.¹¹ Some progress to address this root cause has been achieved on the private side with the adoption of certification and standards such as the RSPO and POIG/No Deforestation. Nonetheless, there is concern that these systems, being privately governed, can be vulnerable; further, transnational private governance is unable to address the issue of environmentally harmful practices in illegal supply chains and domestic markets.¹²

The haze poses serious risks to human life and health. The burning of forests and peatlands releases fine particulate matter, which may be fatal if inhaled. Direct exposure to the haze causes respiratory, heart, eye-related illnesses, and cancer.¹³ Between September and October 2015, the haze crisis reached what was then its worst episode since 1997, causing around 100,300 excess deaths in Indonesia, Malaysia, and Singapore.¹⁴ A study conducted in 2002 on the 1997 haze crisis by Kobayashi and Amagai¹⁵ showed heightened levels (“very unhealthy” and “hazardous”) of carbon monoxide, particulate matter, and polycyclic hydrocarbons. Over 90% of respondents had respiratory symptoms, and elderly individuals suffered a deterioration of health. Longitudinally, future generations may be affected by exposure to the haze. The haze affects child nutritional outcomes and prenatal exposure is associated with stunted growth and human capital losses.¹⁶ has caused serious health and environmental problems in Indonesia and neighboring countries of Malaysia and Singapore. Individuals in both countries have reportedly suffered from respiratory and eye problems, as well as long-term lung damage from the haze.¹⁷ Jones¹⁸ wrote that the haze constitutes internationally and within ASEAN’s definition a security risk and, by extension, a human security risk that is being inadequately addressed due to political and economic interests. Fachrie¹⁹ further opines that the haze constitutes a non-traditional security threat to human life, violating the freedom from fear and freedom from want.

The deforestation policies underlying the haze issue also have large-scale impacts on climate. The 1997 haze crisis resulted in appreciable radiative forcing, contributing to climate change globally and regionally.²⁰ In 2006, Indonesia and Brazil

¹⁰ Herry Purnomo *et al.*, “Fire Economy and Actor Network of Forest and Land Fires in Indonesia,” *Forest Policy and Economics* 78 (2017): 21-31.

¹¹ Sowmya Kadandale, Robert Marten, & Richard Smith, “The Palm Oil Industry and Noncommunicable Diseases,” *Bull World Health Organ* (2019): 118-128.

¹² Helen E.S. Nesadurai, “ASEAN Environmental Cooperation,” 121-145.

¹³ Anna Berti Suman, “The Role of Information in Multilateral Governance of Environmental Health Risk: Lessons From the Equatorial Asian Haze Case,” *Journal of Risk Research* (2019).

¹⁴ Shannon N. Koplitz *et al.*, “Public Health Impacts of the Severe Haze in Equatorial Asia in September-October 2015: Demonstration of a New Framework for Informing Fire Management Strategies to Reduce Downwind Smoke Exposure,” *Environmental Research Letters* 11 (2016).

¹⁵ Shuzo Kobayashi and Takashi Amagai, “The 1997 Haze Disaster in Indonesia: Its Air Quality and Health Effects,” *Archives of Environmental Health an International Journal* (January 2002).

¹⁶ Jie-Sheng Tan-Soo and Subhrendu K. Pattanayak, “Seeking Natural Capital Projects: Forest Fires, Haze, and Early-Life Exposure in Indonesia,” *PNAS* (2019).

¹⁷ Kang Hao Cheong, “Acute Health Impacts of the Southeast Asian Transboundary Haze Problem — A Review,” *International Journal of Environmental research and Public Health* 16 (2019): 4-7.

¹⁸ William J. Jones, “Human Security & Asean Transboundary Haze: An Idea That Never Came,” *Journal of Alternative Perspectives in the Social Sciences* 5, no. 4 (2014): 603-623.

¹⁹ Muhammad Fachrie, “Indonesia’s Forest Fire and Haze Pollution: An Analysis of Human Security,” *Malaysian Journal of International Relations* 8 (2020).

²⁰ P.S. Davison *et al.*, “Estimating the Direct Radiative Forcing Due to Haze From the 1997 Forest Fires

together accounted for two-thirds of total annual emissions from land-use change, placing Indonesia as the third-largest overall greenhouse gas emitter.²¹ In addition, forests are essential to forest communities, whose traditional foods, medicine, equipment, materials, and ornamentation depend on forests, such as East Kalimantan communities.²² These two aspects directly impact the enjoyment of human rights, in particular of communities vulnerable to climate change and those relying on forests for subsistence and cultural practices. However, there is a lack of adequate attention and response given to these two aspects of deforestation, including a lack of public access to information, participation, and justice related to decisions affecting the environment.²³ Fires also cause losses in the rural sector, but data is sparse as coverage mainly focuses on biodiversity. Escaped fires and the negative impact of the haze on agricultural production, including photosynthesis, drought, and the rain cycle. This causes economic losses, particularly in areas such as East Kalimantan.²⁴ In addition, the haze's severity has caused both countries to enact public shutdowns, which substantially affect the livelihoods of individuals in areas affected by the haze.²⁵ The above shows that the haze causes multidimensional issues in human rights, ranging from environmental to economic rights.

A solution to the issue is far from a simple one. Although Indonesian environmental law imposes criminal and civil liability for perpetrators of environmental pollution,²⁶ the pursuit of judicial remedies as both a means to deter future violations and retribute the rights of victims has proven ineffective. On the side of criminal liability, since 2015, police and prosecutors have purported to take measures against violating individuals and corporations, boosted by government support. Despite this, there have not been any substantial improvements in the number of fire sites or pollution levels. In fact, 2019 has been the worst year for air pollution levels in the region since 2016.²⁷ The main reason for this is that police and prosecutors do not have the capacity or seriousness to pursue the liability of perpetrators. For instance, in 2015, many criminal cases against corporations did not end up in court, with 15 out of 18 cases having been stopped through the issuance of warrants of termination by the police.²⁸ On the side of civil liability, on other hand, several civil lawsuits have been made against violating corporations and the Indonesian government for causing the haze and failing to resolve the haze issue, respectively. Between 2017 and 2018, Indonesian courts handed down nine judgments against violating corporations with

in Indonesia," *Journal of Geophysical Research*, 109 (2004): 40.

²¹ Aljosja Hooijer *et al.*, "Assessment of CO2 Emissions From Drained Peatlands in SE Asia," *Delft Hydraulics Report Q3943* (2006).

²² Douglas Sheil *et al.*, *Exploring Biological Diversity, Environment and Local People's Perspectives in Forest Landscapes* (Indonesia: Center for International Forestry Research, 2002), 6.

²³ Frances Seymour, "Forests, Climate Change, and Human Rights: Managing Risk and Trade-offs," in *Human Rights and Climate Change*, ed. Stephen Humphrey (Cambridge: Cambridge University Press, 2009): 9.

²⁴ Tacconi, "Fires in Indonesia," 4.

²⁵ BBC, "Indonesia Haze."

²⁶ Laely Nurhidayah, "Legislation, Regulations, and Policies in Indonesia Relevant to Addressing Land/Forest Fires and Transboundary Haze Pollution: A Critical Evaluation," *Asia Pacific Journal of Environmental Law* 16 (2013).

²⁷ "Singapore Haze Reaches Worst Level in Three Years as Indonesian Forest Fires Rage," Reuters & Associated Press, accessed October 18, 2020, <https://www.scmp.com/news/asia/southeast-asia/article/3027263/singapore-haze-reaches-worst-level-three-years-indonesian>.

²⁸ "Penegakan Hukum Karhutla Dinilai Tidak Serius," Ady Thea, accessed October 19, 2020, <https://www.hukumonline.com/berita/baca/lt5d820f159bc20/penegakan-hukum-karhutla-dinilai-tidak-serius/>.

damages awarded amounting to Rp 3.15 trillion (USD 223.6 million).²⁹ However, out of that sum, only Rp 78 billion (USD 5.54 million) have been recovered by one plaintiff, the Ministry of Environment and Forestry.³⁰ A large sum remains to be collected, and execution of the judgments has been slow.³¹ On the other hand, citizens have also sued the Indonesian government for negligence. In 2019, the Indonesian Supreme Court affirmed a ruling by a lower court that President Joko Widodo and other government figures have failed to abide by their duties under the 2009 Environmental Law in their handling of forest fires.³² The government has denied responsibility and instead sought a review of the ruling (*Peninjauan Kembali*).³³ This failure to provide adequate remedies and access to justice is a human right violation.³⁴

Some international action has been taken, in particular by the Singaporean government, which passed a Transboundary Haze Pollution Act that extends the jurisdiction of Singaporean courts to offshore corporations for haze affecting Singapore. The act has largely been praised. Nonetheless, there are information issues that are inevitably involved in transnational lawsuits of this kind, especially with Indonesia's complex land conflicts and outdated land-use maps.³⁵ Further, as Listiningrum³⁶ argues, action in Singapore is not enforceable in Indonesia and is useful only insofar as the defendant possesses assets in Singapore; Indonesia remains the most optimal forum of choice.

The lack of effectiveness of judicial remedies requires victims to explore other avenues of remedies, i.e., that of non-judicial mechanisms of human rights remedies. An important non-judicial mechanism in the international human rights systems is national human rights institutions. First formalized in the early 1990s in the Paris Principles, national human rights institutions or NHRIs are envisioned as independent organizations funded by the government, tasked with bridging civil societies and governments for the furtherance of human rights.³⁷ In Indonesia, the NHRI currently operating is *Komisi Nasional Hak Asasi Manusia* (National Commission on Human Rights, "Komnas HAM"). This article seeks to find whether Komnas HAM can exercise jurisdiction over violating corporations in the haze crisis as a form of non-judicial remedy for victims, and if so, in what form. Further, it seeks to analyze existing flaws

²⁹ "Nilai Gugatan Rp 3,15 Triliun, 9 Perusahaan Pelaku Karhutla Mulai Dieksekusi," Kompas.com, accessed October 20, 2020, <https://nasional.kompas.com/read/2019/10/01/17444601/nilai-gugatan-rp-315-triliun-9-perusahaan-pelaku-karhutla-mulai-dieksekusi>.

³⁰ "Gugat Pelaku Karhutla, KLHK Baru Kembalikan Rp 78 Miliar ke Negara," Kompas.com, accessed October 19, 2020, <https://nasional.kompas.com/read/2019/10/01/17285211/gugat-pelaku-karhutla-klhk-baru-kembalikan-rp-78-miliar-ke-negara>.

³¹ "Bersalah Bakar Rawa Tripa, Hukuman PT. SPS II Belum Dieksekusi," Junaidi Hanafiah, accessed October 20, 2020, <https://www.mongabay.co.id/2019/10/30/bersalah-bakar-rawa-tripa-hukuman-pt-sps-ii-belum-dieksekusi/>.

³² "Mahkamah Agung Vonis Presiden Joko Widodo Melanggar Hukum Dalam Kasus Kebakaran Hutan, KLHK Akan Ajukan PK," BBC, accessed October 30, 2020, <https://www.bbc.com/indonesia/indonesia-49041224>.

³³ BBC, "Mahkamah Agung Vonis."

³⁴ Prisca Listiningrum, "Transboundary Civil Litigation for Victims of Southeast Asian Haze Pollution: Access to Justice and the Non-Discrimination Principle," *Transnational Environmental Law* 8, no. 1 (2019): 119-142.

³⁵ Janice Ser Huay Lee *et al.*, "Toward Clearer Skies: Challenges in Regulating Transboundary Haze in Southeast Asia," *Environmental Science and Policy* 55 (2016): 87-95.

³⁶ Listiningrum, "Transboundary Civil Litigation," 119-142.

³⁷ United Nations, General Assembly, *Principles relating to the Status of National Institutions (The Paris Principles)*, GA Resolution 48/134 (20 December 1993).

in the framework governing Komnas HAM and propose solutions for how Komnas HAM's work can be improved to help resolve the haze crisis.

II. KOMNAS HAM'S LEGAL FRAMEWORK

A product of Indonesia's New Order regime, Komnas HAM was first established in 1993 pursuant to Presidential Decree Number 50 of 1993 on the National Human Rights Commission³⁸ as a result of increased international criticism of Indonesia's human rights history and the Indonesian Government's *Keterbukaan* (Openness) policy of liberalization.³⁹

Komnas HAM's powers (termed 'works') in the Decree encompass dissemination, research, cooperation, and crucially, the monitoring of human rights along with the provision of opinions, reasonings, and advice to government institutions. Since its inception, Komnas HAM has enjoyed independence from the government, first during the New Order through the appointment of reputedly independent Indonesians as members; this allows it to conduct its activities with relative independence compared to other legal bodies at the time of the New Order.⁴⁰

After the end of the New Order in May 1998, the newly-appointed Reformation government viewed it necessary to repair Indonesia's human rights record. A crucial step taken by the government was strengthening the independence and broadening the powers of Komnas HAM under Law Number 39 of 1999 on Human Rights ("The 1999 Human Rights Law").⁴¹ The 1999 Human Rights Law officially enshrined the status of Komnas HAM as an independent body co-equal to other governmental institutions and is the prevailing law containing the structure, powers, and functions of Komnas HAM. The above-mentioned structure, powers, and functions will be laid out below.

A. Organizational Structure

The 1999 Human Rights Law formalized the organizational structure of Komnas HAM. Pursuant to the Law, Komnas HAM is made up of 35 members, who are elected by the People's Representative Assembly on the basis of Komnas HAM's own recommendation, and appointed by the President. Each member is elected for a term of 5 years, and can only be elected for one more term after his or her term has ended.

Members must be individuals who are of Indonesian nationality, and fall within at least one of four groups:

1. Individuals experienced in the furtherance of human rights and protection of victims of human rights violations;

³⁸ Indonesia, *Keputusan Presiden tentang Komisi Nasional Hak Asasi Manusia (Presidential Decree on the Commission on Human Rights)* KEPPRES No. 50 Tahun 1993 (Presidential Decree Number 50 Year 1993), s. VII.

³⁹ Ken M. P. Setiawan, "Promoting human rights: National Human Rights Commissions in Indonesia and Malaysia" (PhD diss., Leiden University, 2013), 100.

⁴⁰ Timothy Lindsey, "Legal Infrastructure and Governance Reform in Post-Crisis Asia: The Case of Indonesia," in *Law Reform in Developing and Transitional States*, ed. Timothy Lindsey (New York: Routledge, 2007): 15-16.

⁴¹ Indonesia, *Undang-Undang tentang Hak Asasi Manusia (Law regarding Human Rights)*, UU No. 39 Tahun 1999, LN No. 165 Tahun 1999 (Law Number 39 Year 1999, SG No. 165 Year 1999).

2. Individuals who have occupied the position of judge, prosecutor, police, lawyer, or other legal professions;
3. Individuals experienced in the legislature, executive, and other government institutions;
4. Religious figures, public figures, members of non-governmental organizations, and higher education figures.

Structurally, Komnas HAM is made up of three main divisions: the Sub-Commissions, responsible for the performance of Komnas HAM's mandated functions under the law; the Plenary Session, responsible for the election of the Head and Deputy Heads of Komnas HAM and the adoption of the Code of Conduct, Programs, and Working Mechanisms; and the Secretariat, responsible for providing administrative assistance to Komnas HAM's activities. All 35 members of Komnas HAM are part of the Sub-Commissions and the Plenary Session. They can determine their international structure and standard operational procedure through the Code of Conduct. The Secretariat is a separately staffed division headed by a Secretary-General, who is a public servant from outside of Komnas HAM's membership. The Secretariat's position, tasks, responsibilities, and structure are governed by Presidential Decrees.⁴²

In the 2017-2022 term, Komnas HAM's structure comprises two Sub-commissions: the Sub-Commission for the Promotion of Human Rights, whose key functions are to carry out human rights analysis and research and to promote human rights, and the Sub-Commission for the Enforcement of Human Rights, whose key function is to conduct human rights monitoring, as well as investigation and mediation.⁴³ The Commission for the Promotion of Human Rights is made up of the Analysis and Research Division and the Education and Training Division, while the Sub-Commission for the Enforcement of Human Rights, made up of the Complaints Support Division, Supervision and Investigation Division, and the Mediation Division. Each is headed by a commissioner elected from among the 35 members.⁴⁴

According to Presidential Regulation Number 51 of 2019, the Secretariat is made up of both civil servants and "other employees" whose employment is made on the decision of authorized members of government. "Other employees" is a term employed to describe non-civil servants who have been appointed to certain posts in Komnas HAM under the approval of the Ministry of Administrative and Bureaucratic Reform.⁴⁵

Under the 1999 Human Rights Law, Komnas HAM's funding is sourced from the State Budget (*Anggaran Pendapatan dan Belanja Negara*, "APBN").⁴⁶ The State Budget is proposed annually by the government for discussions by the legislature.⁴⁷

⁴² Law Number 39 Year 1999, SG No. 165 Year 1999, s. VII.

⁴³ "Tentang Komnas HAM," Komisi Nasional Hak Asasi Manusia, accessed October 3, 2020, <https://www.komnasham.go.id/index.php/about/1/tentang-komnas-ham.html>.

⁴⁴ "Laporan Tahunan Komnas HAM 2017," Komisi Nasional Hak Asasi Manusia, accessed October 12, 2020, <https://www.komnasham.go.id/>.

⁴⁵ Indonesia, *Peraturan Presiden tentang Tunjangan Kinerja Pegawai Di Lingkungan Sekretariat Jenderal Komisi Nasional Hak Asasi Manusia (Presidential Regulation on Work Benefits of Employees In the Secretariat General of the National Commission on Human Rights)*, Perpres No. 51 Tahun 2019, Lembaran Negara No. 136 Tahun 2019 (Presidential Regulation Number 51 Year 2019, SG No. 136 Year 2019), Arts. 1(1); 1(3)

⁴⁶ Law Number 39 Year 1999, SG No. 165 Year 1999, Art. 98.

⁴⁷ Indonesia, *Undang-Undang Dasar Negara Republik Indonesia 1945 (1945 Constitution of the Republic of Indonesia)*, Art. 23.

B. Powers and Functions

In addition to strengthening Komnas HAM's functions under the 1993 Decree, the 1999 Human Rights Law further appointed Komnas HAM as a quasi-jurisdictional body⁴⁸ responsible for the supervision and mediation of human rights cases. The quasi-jurisdictional powers of Komnas HAM under the Law include:

1. Receiving petitions and complaints on alleged human rights violations (implicit in Art. 89(3)(c) and (d))

Komnas HAM can receive and act on petitions and complaints submitted by members of the public on alleged human rights violations. This function is performed by the Reports Support Division.⁴⁹

2. Independent and court-assisted inquiries into suspected human rights violations (Art. 89(3)(b)-(g))

Pursuant to its supervisory function, Komnas HAM can perform inquiries into possible human rights violations both based on petitions and its independent supervision. This function is performed by the Supervision and Investigation Division. The Division largely performs these powers independently; however, in the exercise of some of these powers, it must obtain prior permission from the Chief Judge of the local District Court ("Chief Judge"). Its powers in this regard are as follows:⁵⁰

1. Inquiries into and examination of events whose nature or scope indicate human rights violations;
2. Summoning of complainants, victims, or other parties of interest for information;
3. Summoning of witnesses for information, and requesting complainants to hand over necessary evidence;
4. Observation of the scene and other locations as necessary;
5. Summoning of related parties for oral testimony or authentic documents with the approval of the Chief Judge; and
6. Local searches of houses, yards, buildings, and other locations occupied or owned by certain parties with the approval of the Chief Judge.

3. Mediation of human rights disputes (Art. 89(4)(a)-(c))

Komnas HAM's work on mediation includes: facilitating peaceful settlement; consultation; negotiation; mediation; conciliation; expert determination; and recommending litigation. This function is performed by the Mediation Division. Its jurisdiction in this matter can only be exercised after consent is obtained from the parties involved, and is immediately voided if the parties choose to pursue a different method of dispute settlement. This choice by the parties is one of the leading factors behind Komnas HAM's cessation of its cases.⁵¹

⁴⁸ This term is used in the Paris Principles to refer to a class of NHRIs having some, but not all of the powers of a judicial body, i.e., to hear and consider petitions and complaints concerning individual organizations, see United Nations, General Assembly, *op.cit.*, Additional principles concerning the status of commissions with quasi-jurisdictional competence.

⁴⁹ Indonesia, *Peraturan Komisi Nasional Hak Asasi Manusia tentang Standar Operasional Prosedur Pelaksanaan Pelayanan Pengaduan (Komnas HAM Regulation on Standard Operational Procedure on the Performance of Reporting Services)* Peraturan Komnas HAM No. 1 Tahun 2016 (*Komnas HAM Regulation No. 1 Year 2016*).

⁵⁰ Law Number 39 Year 1999, SG No. 165 Year 1999, Art. 89(3)(b)-(g).

⁵¹ "Laporan Tahunan Komnas HAM 2018," Komisi Nasional Hak Asasi Manusia, accessed October 21,

3. Making recommendations to the government and the legislature to act on human rights cases (Art. 89(4)(d) and (e))

Komnas HAM's recommendations to the government and the legislature typically pertain to cases of serious human rights violations, such as those occurring in inter-ethnic conflict and persecution of religious groups. Possible steps by the government and the legislature involve the creation of working groups and teams, taking administrative actions, as well as the creation and amendment of legislation on human rights.⁵²

4. Providing assistance to the judiciary on ongoing cases involving human rights violations (Art. 89(3)(h))

Komnas HAM may act to 'provide opinions', on the approval of the Chief Judge, on matters handled by the judiciary involving the violation of human rights of a public sphere or a procedural nature. This has been interpreted by both Komnas HAM and the Courts in two ways: first, as conferring on Komnas HAM the power to act as *amicus curiae*, a concept absent in the Indonesian Code of Criminal Procedure;⁵³ or second, as affirming that Komnas HAM can appear as an 'expert' within the meaning of the Code.⁵⁴ Komnas HAM has recently distanced itself from the label of *amicus*, preferring the term 'human rights opinion' following the language of the 1999 Human Rights Law.⁵⁵

Law Number 26 of 2000 on the Court of Human Rights⁵⁶ further expanded the functions and powers of Komnas HAM for cases of gross human rights violations. The Law prepared the foundations for a special judicial system for gross human rights violations, which extends only to genocide and crimes against humanity. The system included the two-stage investigative process in Indonesian criminal law, with Komnas HAM being appointed preliminary investigator (*penyelidik*) and the Attorney-General's Office advanced investigator (*penyidik*). In its role, Komnas HAM has the power to determine whether a gross human rights violation has occurred. Once sufficient evidence is found, Komnas HAM must then hand over the case to the Attorney-General's Office for the determination of suspects and prosecution.

In this role, Komnas HAM has extensive fact-finding and investigatory powers under Article 19 of the 2000 Court of Human Rights Law. Such powers are as follows:

- a. Performing an investigation and examination of events whose nature or scope indicate grave human rights violations;
- b. Receiving reports or complaints from individuals or groups on the existence of grave human rights violations, and seeking out testimony and evidence;
- c. Summoning complainants, victims, or parties complained against for testimony;

2020, <https://www.komnasham.go.id/>.

⁵² "National Action Plan on Business and Human Rights," Komisi Nasional Hak Asasi Manusia & Lembaga Studi dan Advokasi Masyarakat, accessed October 21, 2020, <https://globalnaps.org/>.

⁵³ See, e.g., Lubuk Basung District Court, "Decision No.129/Pid.B/LH/2017/PN LBB".

⁵⁴ See, e.g., Denpasar District Court Judgment, "Decision No. 780/Pid.B/2014/PN DPS".

⁵⁵ "Laporan Kerja Instansi Pemerintah 2018," Komnas HAM Human Rights Enforcement Support Bureau, accessed October 21, 2020, <https://www.komnasham.go.id> ; for convenience, this paper uses the term *amicus curiae* to refer to Komnas HAM's work in this regard.

⁵⁶ Indonesia, *Undang-Undang tentang Pengadilan Hak Asasi Manusia (Law on the Human Rights Court)*, UU No. 26 Tahun 2000, Lembaran Negara No. 208 Tahun 2000 (Law No. 26 Year 2000, SG No. 208 Year 2000).

- d. Summoning witnesses for testimony;
- e. Observing and gathering testimony at the scene and other locations as necessary;
- f. Summoning parties of interest to give written testimony or hand over authentic documents;
- g. On the orders of the advanced investigator:
 1. Examine documents;
 2. Perform search and seizure;
 3. Perform an investigation on houses, yards, buildings, and other locations occupied or owned by certain parties;
 4. Invite experts in relation to the preliminary investigation.⁵⁷

There is jurisprudence to the effect that Komnas HAM's investigative powers under the 1999 Human Rights Law, which is made in pursuit of its supervisory function of human rights, are inappropriate to its role as a preliminary investigator under the 2000 Court of Human Rights Law. In July 2003, the District Court of Central Jakarta refused to grant a request by Komnas HAM to summon nine military and police officers in relation to the May 1998 riots leading to the end of the New Order. The Court based its decision on the fact that Komnas HAM was no longer acting within the ambit of its supervisory function, but rather its role as preliminary investigator. As a consequence, the Court held that the provisions on Court assistance within the 1999 Human Rights Law no longer applied and that the Indonesian Code of Criminal Procedure applies instead.⁵⁸

III. KOMNAS HAM'S JURISDICTION IN PRACTICE

Komnas HAM has played a very active role in the Indonesian justice system, especially in politically charged cases. One of Komnas HAM's most well-known cases was the "Bloody Abepura" (*Abepura Berdarah*) case in December 2000. Following an attack on a police station in Abepura, Papua by unknown persons, the local police used force against and arrested around 100 civilians. Komnas HAM assumed the role of a preliminary investigator under the 2000 Court of Human Rights Law and issued the results of its investigations in February 2001, stating that the crimes against humanity of assault, torture, and summary execution of civilians had occurred. The matter was brought to trial in a local Court of Human Rights established pursuant to the 2000 Court of Human Rights Law. In the end, both officers were acquitted and claims for compensation by victims were dismissed, with a judge labeling the victims "rioters".⁵⁹

Most of Komnas HAM's works are based on human rights violations under the 1999 Human Rights Law. Komnas HAM has exercised its quasi-jurisdiction over all classes of legal subjects. Komnas HAM has performed inquiries and investigations

⁵⁷ Indonesia, *Undang-Undang tentang Pengadilan Hak Asasi Manusia*, Chapter III, Section 4.

⁵⁸ "Laporan Akhir Naskah Akademik Rancangan Undang-Undang Perubahan UU No. 26 Tahun 2000 tentang Pengadilan Hak Asasi Manusia (HAM)," Working Group of the National Legal Planning Centre, accessed October 22, 2020, https://www.bphn.go.id/data/documents/na_ruu_tentang_perubahan_uu_no.26_tahun_2000_tentang_pengadilan_ham.pdf.

⁵⁹ "Derailed: Transitional Justice in Indonesia Since the Fall of Soeharto," International Centre for Transitional Justice & KontraS, accessed October 23, 2020, https://www.ictj.org/sites/default/files/ICTJ-Kontras-Indonesia-Derailed-Report-2011-English_0.pdf.

of individuals, regional and central governments, auxiliary government institutions, and corporations. In fact, most alleged wrongdoers in Komnas HAM's human rights inquiries and investigations have been corporations. In 2018, 67 out of 126 petitions or complaints were made against corporations: 54 against privately held companies, and 13 against state-owned companies. Most allegations centered on violations of land rights.⁶⁰

A. Recommendations by Komnas HAM on Corporations

Komnas HAM's inquiries, investigations, and recommendations are largely based on reports from private individuals. Many of its prominent recommendations have been made in the context of alleged human rights violations involving corporations.

1. PT Lapindo Brantas

PT Lapindo Brantas' oil drilling in Sidoarjo, a region in the island of Java, led to a massive mudflow disaster in May 2006. The drilling permits had been issued by the regional government in a manner inconsistent with existing regional planning. Most experts now agree that the drilling had penetrated an underground mud volcano, which in turn erupted and caused a massive hot mudflow once the drill was pulled out of the well. The flow has continued to this day, and despite attempts at containment, some dozen villages have been submerged by mud, with a dozen dead and tens of thousands of locals displaced.⁶¹

Komnas HAM formed a team to perform an inquiry into the disaster and issue a report on whether human rights violations had occurred. The team worked with experts on oil, geology, landscape planning, and law, and issued an initial finding in 2007 to the end that human rights violations had indeed occurred.⁶² It later issued a report in 2012 condemning PT Lapindo Brantas as the party responsible for such violations and requested the Indonesian police to revoke its decision to stop investigations and take into account its findings.⁶³ PT Lapindo Brantas has agreed to pay compensation.⁶⁴

Some actions were taken by the government in the Lapindo case independently of Komnas HAM recommendations. In 2007, the government established the BPLS, a body responsible for handling claims of compensation for victims, which answers to the President.⁶⁵ This body was later disbanded and replaced in 2017 by the PPLS, a similar body responsible directly to the Housing Ministry.⁶⁶

⁶⁰ Komisi Nasional Hak Asasi Manusia, "Laporan Tahunan Komnas HAM 2018," 38.

⁶¹ Gina Hauge, "Social and Economic Consequences of Natural Hazards: The Case of the Lapindo Mudflow in Indonesia," (Thesis, University of Agder, 2018): 125.

⁶² "Komnas Hak Identifikasi Pelanggaran HAM Lumpur Lapindo," Tempo.co, accessed October 20, 2020, <https://nasional.tempo.co/read/111945/komnas-ham-identifikasi-pelanggaran-ham-lumpur-lapindo>.

⁶³ "Komnas HAM: Kasus Lapindo Adalah Kejahatan," Tempo.co, accessed October 20, 2020, <https://nasional.tempo.co/read/423492/komnas-ham-kasus-lapindo-adalah-kejahatan/full&view=ok>.

⁶⁴ "Indonesian firm agrees compensation for mud disaster," Reuters, accessed October 20, 2020, <https://uk.reuters.com/article/uk-indonesia-mudflow/indonesian-firm-agrees-compensation-for-mud-disaster-idUKJAK28627620061204>.

⁶⁵ Indonesia, *Peraturan Presiden tentang Badan Penanggulangan Lumpur Sidoarjo (Presidential Regulation on the Sidoarjo Mudflow Relief Agency)* Perpres No. 14 Tahun 2007 (Presidential Regulation No. 14 Year 2007).

⁶⁶ Indonesia, *Peraturan Presiden tentang Pusat Pengendalian Lumpur Sidoarjo (Presidential Regulation on the Sidoarjo Mudflow Control Centre)*, Peraturan Presiden No. 21 Tahun 2017 (Presidential Regulation No. 21 Year 2017).

Most of Komnas HAM's recommendations have been disregarded. Many victims have not received sufficient, if any, compensation. The police have not conducted further investigations, despite Komnas HAM's recommendations otherwise, following the failure of a civil suit against PT Lapindo Brantas.⁶⁷ A 2017 audit issued by Komnas HAM on the government and the legislature's actions has condemned what the organization perceives as unresolved issues, including failures to map out the location of displaced victims, stop the hot mudflow, and the insufficiency of measures aimed at restoring rights to education and a living.⁶⁸

In addition to its exercise of functions under the Human Rights Law of 1999, the Komnas HAM team initiated a 2009 attempt to act as an initial investigator under the Court of Human Rights Law of 2000. However, the attempt was later stopped by the Komnas HAM Plenary on the grounds that the disaster did not fall into either genocide or crimes against humanity, the only two grounds for prosecution under the Law.⁶⁹

2. Muara Tae Village Land Dispute

The Muara Tae village of Kalimantan has been subject to land disputes between the Dayak Benuaq indigenous people and multiple corporations: PT Sumber Mas on a selective-logging concession in 1971; PT Sumber Mas on an industrial forestry plantation license in 1993; PT London Sumatra Tbk on a palm oil plantation license and PT Gunung Bayan Pratama Coal on a coal mining concession in 1995; PT Munte Waniq Jaya Perkasa on a palm oil plantation license in 2011; PT Borneo Surya Mining Jaya on a palm oil plantation license in 2012; and overlapping claims for use for land between PT Borneo Surya Mining Jaya for palm oil plantation and PT Munte Waniq Jaya Perkasa for a location permit.

In the face of rejection by locals of the above corporations' attempts to change their village borders, these corporations have perpetrated manipulation of, and even violence against, the local indigenous people, enforced by corporation-hired thugs and even policemen. As a result, a large portion of indigenous locals was displaced outside of their ancestral land, many fearing their male relatives dead. Many members of the community have also been criminalized, even in recent years.⁷⁰

In 2014, Komnas HAM initiated an inquiry into violations of indigenous land rights according to 140 reports by the Dayak Benuaq and many other indigenous communities. Throughout 2014, it performed on-site studies and public hearings involving indigenous peoples.⁷¹

The results were published in a 2016 report. Komnas HAM found that Muara Tae had then been fragmented into six, each possessed by a corporation. Locals were deprived of their traditional means of livelihood and rejected from employment in these corporations. Severe environmental damage had occurred to the pristine Nayan river due to toxic waste and to the local air from dust and dirt. Access to electricity and

⁶⁷ "Perdata Keok, Pidana Hilir-Mudik," Tempo.co, accessed October 24, 2020, <https://majalah.tempo.co/read/130510/perdata-keok-pidana-hilir-mudik>.

⁶⁸ "Tragedi Lumpur Lapindo, Komnas HAM: Korporasi Harus Taat HAM," Tempo.co, accessed October 24, 2020, <https://nasional.tempo.co/read/879643/tragedi-lumpur-lapindo-komnas-ham-korporasi-harus-taat-ham>.

⁶⁹ "Komnas HAM: Tak Ada Pelanggaran HAM Berat Dalam Kasus Lapindo," Merdeka.com, accessed October 24, 2020, <https://www.merdeka.com/peristiwa/komnas-ham-tak-ada-pelanggaran-ham-berat-dalam-kasus-lapindo.html>.

⁷⁰ "Inkuiri Nasional Komnas HAM," Komisi Nasional Hak Asasi Manusia, accessed October 25, 2020, [https://www.komnasham.go.id/files/20160528-konflik-agraria-masyarakat-adat-\\$E705F0M.pdf](https://www.komnasham.go.id/files/20160528-konflik-agraria-masyarakat-adat-$E705F0M.pdf).

⁷¹ Komisi Nasional Hak Asasi Manusia, "Inkuiri Nasional Komnas HAM."

water by the indigenous people is very limited. In addition, access to legal remedies has proven ineffective; in 2012, the Village Head and several villagers attempted to report acts of violence conducted against them by these corporations to the police, but no investigations or prosecutions had been made.⁷²

However, little action had been taken since. The Muara Tae police report has not been acted upon, nor has the central and regional government and the legislature enacted regulations to protect the Dayak Benuaq's right to land. Even as recently as 2017, palm oil and mining corporations have continued to operate in the area.⁷³

3. PT Pusaka Benjina Resources

In late March 2015, the Indonesian Illegal Fishing Task Force found 322 crewmen stranded in Benjina, a city in the Aru Islands of Maluku in Indonesia. The men, who were of Myanmar, Cambodian, and Laotian nationalities, were employees of PT Pusaka Benjina Resources, a foreign-owned Indonesian fishing company operating to catch and process fish. In addition, mass graves were found on the island, suspected to contain deceased victims.

Komnas HAM initiated an inquiry that same month, performing interviews of the crew. Some men claimed to have been victims of slavery for 10 years, being subjected to inhumane treatment and without remuneration. This was corroborated by investigations done by the International Organization of Migration, which confirmed that 85 of the crew were victims of human trafficking. It released its initial findings in mid-April to the regional office of the Ministry of Marine Affairs and Fisheries.⁷⁴

Komnas HAM released a report in May 2015 that eleven human rights had been violated in the course of the men's employment: 1) the right to life; 2) the right to a family; 3) the right to free development; 4) the right to be free from slavery; 5) the right to religion and practice one's beliefs; 6) the right to security; 7) the right not to be subjected to cruel, inhumane, and degrading treatment; 8) the right to not be arbitrarily deprived of one's liberty; 9) the right to welfare; 10) the rights of the child and; 11) the right over indigenous territory.⁷⁵

Komnas HAM proceeded to assist the Indonesian Police Force, the Ministry of Marine Affairs and Fisheries, and the Thai embassy in the case.⁷⁶ Investigations by the Indonesian police led to indictments of 8 individuals: 5 Thai captains: Youngut Nitiwongchaero, Boonsom Jaika, Surachai Maneephong, Hatsaphon Phaetjakreng, and Somchit Korraneeasuk, and 3 Indonesians: Martno, Ohoitenan, and Hanorsian, who worked for the company. All were eventually sentenced to three years in prison.⁷⁷

The victims felt that the punishment was too light. Further, the Indonesian Ministry

⁷² Komisi Nasional Hak Asasi Manusia, "Inkuiri Nasional Komnas HAM."

⁷³ "Muara Tae yang Tidak Pernah Henti Diusik Masalah," Yovanda, accessed October 25, 2020, <https://www.mongabay.co.id/2017/02/08/muara-tae-yang-tidak-pernah-henti-diusik-masalah/>.

⁷⁴ "Komnas HAM Uncovers Human Trafficking Case in Benjina," Antara Maluku, accessed October 27, 2020, <https://ambon.antaranews.com/berita/27957/komnas-ham-uncovers-human-trafficking-case-in-benjina>.

⁷⁵ "Komnas HAM: Ada 11 Pelanggaran HAM di Kasus Perbudakan Benjina," Idham Khalid, accessed October 27, 2020, <https://news.detik.com/berita/2928736/komnas-ham-ada-11-pelanggaran-ham-di-kasus-perbudakan-benjina>.

⁷⁶ "Rancangan Laporan Singkat Dengar Pendapat Komisi III DPR RI dengan Komnas HAM RI," Dewan Perwakilan Rakyat Indonesia, accessed October 27, 2020, <http://www.dpr.go.id/dokakd/dokumen/K3-23-f30a75db6f9b51a748c15e8e8416af14.pdf>.

⁷⁷ "Five Jailed in Seafood Slavery Case," Associated Press, accessed October 27, 2020, <https://www.theguardian.com/world/2016/mar/11/seafood-slave-drivers-given>.

of Marine Affairs and Fisheries had expressed concern that prosecutions had not been made against the masterminds of the operation.⁷⁸ However, no appeals or further legal steps have been taken. In fact, PT Pusaka Benjina Resources has continued to operate despite investigations by the Ministry.⁷⁹

B. *Amicus Curiae* Work by Komnas HAM Relating to Corporations

Komnas HAM's *amicus* function has in practice been performed with the existence of requests from parties. As a result, its work in this regard is relatively few, with the average annual number of testimonies between 2013-2017 being 7.6 cases.⁸⁰

1. Tangerang District Court Case Number 374/Pdt.G/2014/PN.TNG

Case Number 374/Pdt.G/2014/PN.TNG was a civil suit between Komang Ani Susana (Plaintiff) against the Company Director of PT Paramount Enterprise International (Defendant) and the Head of the Tangerang Land Registry (Co-Defendant). The dispute concerned overlapping claims made by Defendant on land belonging to Plaintiff. The defendant had, despite multiple complaints by Plaintiff, refused to allow land area measurements to ascertain the legitimate limits. Further, the co-defendant had not taken any action despite petitions raised by Plaintiff.⁸¹

Komnas HAM performed an inquiry into the matter, examining relevant land documents and performing on-site studies. It released Recommendation No. 2.08/K/PMT/VII/2013 in July 2013 to the Head of the National Land Registry to the effect that human rights violations that had occurred.⁸² On Plaintiff's application to the District Court of Tangerang, Komnas HAM supplied Recommendation Number 0.087/K/PMT/I/2015, opining that Plaintiff's rights to justice and property must be protected.⁸³

The case was eventually decided in favor of the Defendant and Co-Defendant on the procedural point of *obscuur libel* (lit. obscurity), as Plaintiff had failed to specify the limits of the plot of land forming the basis of the dispute and its location.⁸⁴

2. Semarang Administrative Court Case Number 064/G/2014/PTUN

The Administrative Court is a special court established pursuant to Law Number 5 of the Year 1986 on the Administrative Court, as amended, to adjudicate administrative decisions made by state organs.⁸⁵ Case Number 064/G/2014/PTUN was adjudged according to a civil suit against an administrative decision by the Governor of Central Java to grant an environmental permit to PT Semen Indonesia.

⁷⁸ "Menteri Susi: Proses Hukum Benjina Belum Menyasar Dalangnya," BBC, accessed October 30, 2020, https://www.bbc.com/indonesia/berita_indonesia/2016/03/160303_indonesia_benjina_susi.

⁷⁹ "Slave-Linked Fishing Firm Thought to Have Resumed Operations in Indonesia," M. Ambari, accessed October 30, 2020, <https://news.mongabay.com/2016/09/slave-linked-fishing-firm-thought-to-have-resumed-operations-in-indonesia/>.

⁸⁰ "Laporan Akuntabilitas Kinerja Biro Dukungan Penegakan HAM 2015," Komisi Nasional Hak Asasi Manusia, accessed October 31, 2019, [https://www.komnasham.go.id/files/20160908-laporan-akuntabilitas-kinerja--\\$6OLDDK4.pdf](https://www.komnasham.go.id/files/20160908-laporan-akuntabilitas-kinerja--$6OLDDK4.pdf).

⁸¹ Tangerang District Court. "Decision No. 374/Pdt.G/2014/PN.TNG."

⁸² Tangerang District Court. "Decision No. 374/Pdt.G/2014/PN.TNG."

⁸³ "Laporan Tahunan Komnas HAM 2015," Komisi Nasional Hak Asasi Manusia, accessed October 22, 2020, [https://www.komnasham.go.id/files/20161008-laporan-tahunan-komnas-ham-2015-\\$R0EQ47E.pdf](https://www.komnasham.go.id/files/20161008-laporan-tahunan-komnas-ham-2015-$R0EQ47E.pdf).

⁸⁴ Tangerang District Court, "Decision No. 374/Pdt.G/2014/PN.TNG."

⁸⁵ Indonesia, *Undang-Undang tentang Peradilan Tata Usaha Negara (Law on the Administrative Court)*, UU No. 5 Tahun 1986, Lembaran Negara No. 77 Tahun 1986 (Law No. 5 Year 1986, SG No. 77 Year 1986).

PT Semen Indonesia was granted a concession for mining as well as the installation of a factory in the district of Rembang in a license signed by the Governor. Prior to the concession, PT Semen Indonesia had issued an environmental impact assessment viewed as suspicious by the local community.⁸⁶ Protests ensued, and a citizen lawsuit was made to the Administrative Court based on detriment to the community against the permit.

Komnas HAM launched an inquiry into the case and issued a public report stating that PT Semen Indonesia's operations would be contrary to the human right to a healthy environment. The community voiced support and later requested Komnas HAM to appear in court, where it testified on its findings. The court of the first instance declined the suit,⁸⁷ but a final appeal made to the Supreme Court was decided in favor of the citizens.⁸⁸

C. Mediation by Komnas HAM Involving Corporations

Komnas HAM's handling of mediation cases has increased year-on-year.⁸⁹ In 2013, it was handling 381 cases. By 2018, that number had increased to 685 cases.⁹⁰ Komnas HAM's success in performing mediation with corporations relies heavily on the parties' willingness to cooperate and compromise. On average, it has produced 7.2 mediation agreements annually between 2013 and 2017.⁹¹

1. PT Bangun Nusantara Jaya

One example of Komnas HAM's successful mediation occurred in the 2018 coal mining dispute between the indigenous Dayak Ma'anyan community and PT Bangun Nusantara Jaya Makmur (BNJM). PT BNJM allegedly caused environmental damage and pollution in the Karasik Mountain village where the indigenous community resides, leading to the filing of a complaint to Komnas HAM by representatives of the community.

Komnas HAM facilitated the mediation session, attended by the Komnas HAM Mediation Commissioner, government representatives, and local environmental government institutions, alongside representatives of both parties. Out of four demands by the community: 1) restoration of the rivers Mabayoi, Udak, and Banuang, which had been subject to mining, as well as silted rivers Garunggung and Paku; 2) post-mining reclamation; 3) a review of mining plans using the blasting technique; 4) excluding the Gunung Karasik village area from corporate concession; PT BNJM assented to one, the restoration of the Mabayoi river. The mediation agreement was eventually signed on July 31, 2019, with enforcement being compulsory within 30 days after the agreement.⁹²

⁸⁶ "Begini Kejanggalan Amdal PT Semen Indonesia di Rembang," *Tempo.co*, accessed November 1, 2020, <https://nasional.tempo.co/read/701899/begini-kejanggalan-amdal-pt-semen-indonesia-di-rembang>.

⁸⁷ "Kalah di PTUN, Massa Penolak Pabrik Semen Rembang Berurai Air Mata," *detikNews*, accessed November 10, 2020, <https://news.detik.com/berita/2889489/kalah-di-ptun-massa-penolak-pabrik-semen-rembang-berurai-air-mata/1>.

⁸⁸ Supreme Court of Indonesia, "Decision No. 99/PK/TUN."

⁸⁹ "Laporan Kinerja Institusi Pemerintah 2016," Komisi Nasional Hak Asasi Manusia, accessed November 10, 2020, [https://www.komnasham.go.id/files/20171002-laporan-kinerja-lkip-komnas-ham-\\$99V.pdf](https://www.komnasham.go.id/files/20171002-laporan-kinerja-lkip-komnas-ham-$99V.pdf).

⁹⁰ "Laporan Tahunan Komnas HAM 2018," Komisi Nasional Hak Asasi Manusia, accessed November 10, 2020, [https://www.komnasham.go.id/files/20190807-laporan-tahunan-komnas-ham-2018-\\$1PC.pdf](https://www.komnasham.go.id/files/20190807-laporan-tahunan-komnas-ham-2018-$1PC.pdf).

⁹¹ Komisi Nasional Hak Asasi Manusia, "Laporan Tahunan Komnas HAM 2018."

⁹² "Teguh Juang Anak Gunung Karasik: Mediasi Komnas HAM Atas Kasus Sengketa Dugaan Pencema-

2. PT Asiatic Persada

However, not all initially successful mediations have subsequently produced positive results for the parties. One instance of this is the land conflict between the Jambi indigenous community (“SAD113”) and PT Asiatic Persada, which has remained ongoing since 1986. PT Asiatic Persada had obtained a concession from the government over forest lands traditionally inhabited by SAD113. Mining by Asiatic had, additionally, caused the digging of a trench that prevented SAD113 from exiting their ancestral land.

In 2012, Komnas HAM conducted mediation between the parties as well as the local government. Three points of agreement were achieved: 1) Asiatic was obliged to re-measure its land concession following government-imposed limits, 2) Asiatic was obliged to provide funding for compensation, and 3) the local government was to verify locals entitled to compensation. Asiatic further promised to give back 2,000 hectares of land to SAD113.⁹³ However, no steps were in fact taken by Asiatic; even up to 2019, SAD113 continued to conduct an annual march from Jambi to the capital, Jakarta in protest of perceived injustice.⁹⁴

There have, furthermore, been breakdowns of relations before and during Komnas HAM-facilitated mediation leading to a lack of agreement. For instance, four mediation attempts by Komnas HAM between PT Indah Kiat Pulp and Paper and Glinseng villagers, who have been isolated by the company’s land use, ended in failure.⁹⁵

IV. KEY CHALLENGES FOR KOMNAS HAM IN ESTABLISHING JURISDICTION IN THE HAZE CRISIS

The magnitude of the haze problem has led to multiple condemnations by Komnas HAM against violating corporations. It is worth noting that, for the past years, Komnas HAM has declared the haze problem to be a ‘serious violation of human rights’ involving systemic failure on the part of the government.⁹⁶ Komnas HAM has pointed out the slowness of government response, scattered efforts, and weaknesses in planning and early identification of potential and actual victims of the haze, all of which have failed to restore the right to health of members of the public who have been exposed to the haze. While the government has indeed formed a task force to mitigate the haze’s negative impacts, the overlapping and sporadic powers of

ran Lingkungan Antara Masyarakat Adat Dayak Ma’anyan Dusun Gunung Karasik dan PT BNJM,” WALHI, accessed November 11, 2020, <http://walhikalteng.org/2019/07/31/teguh-juang-anak-gunung-karasik-mediiasi-komnas-ham-atas-kasus-sengketa-dugaan-pencemaran-lingkungan-antara-masyarakat-adat-dayak-maanyan-dusun-gunung-karasik-dan-pt-bnjm/>.

⁹³ “Kala Konflik Lahan SAD 113 dengan Asiatic Persada Berlarut, Mengapa?,” Elviza Diana, accessed November 11, 2020, <https://www.mongabay.co.id/2016/06/07/kala-konflik-lahan-sad-113-dengan-asiatic-persada-berlarut-mengapa/>.

⁹⁴ “Konflik Lahan Berlarut, Suku Anak Dalam Jalan Kaki Lagi ke Jakarta,” Elviza Diana, accessed November 11, 2020, <https://www.mongabay.co.id/2019/09/14/konflik-lahan-berlarut-suku-anak-dalam-jalan-kaki-lagi-ke-jakarta/>.

⁹⁵ “Kecewa dengan Komnas HAM, Warga Glinseng Walk Out,” Kompasiana, accessed November 11, 2020, <https://www.kompasiana.com/daddyhartadi/55001581a33311bb7450f8bd/kecewa-dengan-komnas-ham-warga-glinseng-walk-out>.

⁹⁶ “Pelanggaran HAM di Balik Bencana Kabut Asap,” Mochamad Januar Rizki, accessed November 12, 2020, <https://www.hukumonline.com/berita/baca/lt5d96f86d50186/pelanggaran-ham-di-balik-bencana-kabut-asap/>; see also “Pemerintah RI Harus Hentikan Kabut Asap Riau,” Komnas HAM, accessed November 12, 2020, <https://www.komnasham.go.id/index.php/news/2015/9/29/208/pemerintah-ri-harus-hentikan-korban-asap-riau.html>.

government institutions have prevented an improvement in efforts against the haze. In addition, local governments lack sufficient resources and political will to allocate funds to resolve this issue. Finally, efforts have been focused on stopping the fires, instead of preventing them from occurring in the first place.⁹⁷

In 2016, when the haze was at its worst, Komnas HAM issued a 5-point recommendation for the government to perform in-depth studies into the problem, as follows: 1) Planning and implementing protective measures for the right to health for citizens, especially those residing in regions where hotspots are located; 2) Performing thorough health examinations of citizens who had been exposed to the resultant smoke for around 18 years; 3) Amending existing legislation on forest fire responses to allow for a planned, systematic, cohesive, and human rights-oriented response; 4) Evaluating and revising organizations and standard operational procedures for the protection and fulfillment of the right to health and; 5) Empowering societies and government institutions on national and regional levels in the protection of the human right to health.⁹⁸

Notably, Komnas HAM's jurisdiction as an NHRI has been deemed to fulfill the thresholds of the Paris Principles, which requires that an NHRI have mandate and competence, autonomy from government, independence guaranteed by statute or constitution, pluralism, adequate resources, and adequate powers of investigation.⁹⁹ Komnas HAM has full "A" status under the Paris Principles, which it first obtained in 2000.¹⁰⁰

However, there remain legal and practical challenges which, while unaddressed in said criteria, have thus far prevented, and will prevent it from being able to take measures against companies behind the haze problem. The many unresolved cases handled by Komnas HAM, such as the Lapindo and Muara Tae cases, are exemplary of this. These issues, as well as their implications, are explained below in the context of Komnas HAM's powers and functions under the 1999 Human Rights Law, which is the framework on which Komnas HAM may operate in helping resolve the haze crisis.¹⁰¹

A. Issues with Komnas HAM's Legal Framework

Although the 1999 Human Rights Law does grant Komnas HAM powers in performing inquiries against corporations under the 1999 Human Rights Law, the Law does not allow Komnas HAM to do this for litigatory purposes, but simply in preparation for recommendations. It is notable that this already fulfills the standard for "adequate powers" under the Paris Principles, which requires only that it has enough powers to "consider questions on the proposal of a member or petitioner",

⁹⁷ "Penanganan Asap Karhutla Abaikan Hak Asasi Manusia," Eva Nila Sari, accessed November 12, 2020, <https://www.komnasham.go.id/index.php/news/2016/9/10/2/penanganan-asap-karhutla-abaikan-hak-asasi-manusia.html>.

⁹⁸ "5 Rekomendasi Komnas HAM Terkait Kebakaran Hutan dan Lahan," Mohamad Agus Yozami, accessed November 12, 2020, <https://www.hukumonline.com/berita/baca/lt57d158d92f263/5-rekomendasi-komnas-ham-terkait-kebakaran-hutan-dan-lahan/>.

⁹⁹ "Paris Principles," Global Alliance of National Human Rights Institutions, accessed November 12, 2020, <https://nhri.ohchr.org/EN/AboutUs/Pages/ParisPrinciples.aspx>.

¹⁰⁰ "Accreditation Status Chart", NHRI, accessed November 12, 2020, <https://nhri.ohchr.org/EN/Documents/AccreditationStatusChart.pdf>.

¹⁰¹ Given existing precedent from the Lapindo case, as discussed earlier, that environmental disasters cannot fall within the category of gross human rights violations under the 2000 Court of Human Rights Law, Komnas HAM's relevant exercise of human rights jurisdiction on this matter can be found within the 1999 Human Rights Law.

which includes “the authority to hear from a victim, representative of the victim or from third parties, and ... to carry out own-motion investigations”.¹⁰² However, this does not mean that these powers of investigation can translate into meaningful results for victims; indeed, as explored below, the political and legal structures surrounding Komnas HAM’s functioning and reparations for victims are such that its inquiries may simply be ineffective.

First, Komnas HAM’s inability to issue binding decisions prevents satisfactory reparations to victims. On the one hand, it prevents both Komnas HAM and aggrieved parties from being able to independently obtain mandatory reparations, even after findings that human rights violations had occurred. While in the case of other NHRIs, there is sufficient leverage to allow voluntary compliance by perpetrators, the many cases where Komnas HAM’s recommendations have been left unheeded by corporations is evidence that Komnas HAM has yet to obtain the necessary leverage to do this. One answer to this is that Komnas HAM needs but lacks enforcement powers.

On the other hand, Komnas HAM and aggrieved parties alike often cannot obtain satisfactory reparations from the means available under the 1999 Human Rights Law, namely through recommendations to the government and legislature. The government and the legislature are not empowered to make recommendations to the prosecutor. Decisions as to whether to bring perpetrators to justice are made entirely by the Attorney-General’s Office, to which Komnas HAM has no power under the 1999 Human Rights Law. On the other hand, solutions proposed by the government and the legislature are sometimes incompatible with those envisioned by Komnas HAM. As in the examples mentioned above, the government and the legislature often neglect to consult with Komnas HAM prior to the making of decisions. While victims can certainly obtain remedies through the courts, it adds additional layers of difficulty given the uncertainties in Indonesian judicial processes¹⁰³ as well as the length and costs of litigation that aggrieved parties would have to undertake.

Secondly, Komnas HAM’s evidence-gathering powers, particularly in witness summoning, may hinder it from performing its inquiries effectively. On the one hand, Komnas HAM’s powers to summon witnesses independently without court assistance do not come with enforcement powers; it cannot issue legally binding decisions to summon witnesses. On the other hand, while its powers to summon witnesses through court orders would allow it to ensure the summoning of these individuals, potential issues may arise with courts refusing to grant Komnas HAM’s request for court-ordered witness summoning and handing over of documents.

Thirdly, Komnas HAM has no means by which to defend its jurisdiction, should there arise any conflicts with other government bodies in this regard. Despite its co-equal status to other government institutions, members of Komnas HAM do not enjoy immunity. In addition, Komnas HAM’s lack of foundation in the Indonesian Constitution means that issues of its jurisdiction in relation to other government bodies, such as the Ministry of Law and Human Rights, the Attorney-General’s Office, and the Indonesian Legislature, is not justiciable before the Constitutional Court.¹⁰⁴

¹⁰² United Nations Development Programme & Office of the High Commissioner for Human Rights, *Toolkit for Collaboration with National Human Rights Institutions* (United Nations, 2010), 254.

¹⁰³ “Indonesia: Weak Judicial System and Insufficient Legal Aid Allows For Unfair Trial,” Asian Legal Resource Centre, accessed November 8, 2020, <http://alrc.asia/indonesia-weak-judicial-system-and-insufficient-legal-aid-allows-for-unfair-trial/>.

¹⁰⁴ “Komnas HAM Butuh Penguatan Kewenangan,” Hukumonline, accessed November 8, 2020, <https://www.hukumonline.com/berita/baca/lt4f7d11402f7ae/komnas-ham-butuh-penguatan-kewenangan/>.

Attempts to strengthen Komnas HAM's jurisdiction have been made in the past, including an attempt to amend the 1999 Human Rights Law in 2008¹⁰⁵ and also in 2010.¹⁰⁶ However, the amendment was never put to the vote in the legislature.

Another issue that arises from Komnas HAM's legal foundations is the issue of "adequate resources", another requirement under the Paris Principles. The Paris Principles require that an NHRI be 'sufficient' for its basic functions, and 'secure' in that it "should not be altered arbitrarily", preferably in a way that allows Parliament to review and approve budgets made by the NHRI in question.¹⁰⁷ The Indonesian model of NHRI funding does follow this model, with Komnas HAM's budget being approved by the Indonesian legislature. However, in practice, it has the unwanted result of allowing the Indonesian legislature to choke Komnas HAM's ability to operate; in 2018, Komnas HAM had to request the Indonesian legislature not to cut its budget, to no avail.¹⁰⁸ Finally, the civil servant status of some of its staff in the secretariat may affect its independence.

B. Issues with Komnas HAM in Practice

In practice, Komnas HAM's operations have also been far from perfect. There have been concerns about the transparency of Komnas HAM's work. In 2016, the Supreme Audit Agency (Badan Pemeriksa Keuangan, "BPK") confirmed that members of Komnas HAM had been embezzling public funds amounting to Rp6 billion; oddly, the organization insisted on not taking the matter to court.¹⁰⁹

This issue has compounded declining trust in Komnas HAM's work as a human rights organization compared to its early years. Komnas HAM has produced regulations that seem to impede its own work, such as its highly criticized 2013 decision to rotate its chairperson annually, potentially jeopardizing its own focus and long-term projects. Further, there is increasing perception that Komnas HAM's work is politically motivated, and allegations of politically charged appointments by the government and legislature to the commissioners' seats, which have caused trust in the organization to weaken.¹¹⁰

V. POTENTIAL SOLUTIONS

The above challenges, spanning legal and practical issues, require a multifaceted solution. Komnas HAM must be strengthened, and at the same time rehabilitate its image, as to be able to effectively exercise jurisdiction over the haze crisis and engage in much-needed cooperation with different sectors of society. The primary means

¹⁰⁵ "Perkuat Komnas HAM Melalui Revisi UU HAM," Hukumonline, accessed November 7, 2020, <https://www.hukumonline.com/berita/baca/hol19663/perkuat-komnas-ham-melalui-revisi-uu-ham>.

¹⁰⁶ "Rekomendasi Diabaikan, Komnas HAM Usul Kewenangan Baru," Hukumonline, accessed November 7, 2020, <https://www.hukumonline.com/berita/baca/lt4c11e55b90c5d/rekomendasi-diabaikan-komnas-ham-usul-kewenangan-baru>.

¹⁰⁷ United Nations Development Programme & United Nations High Commissioner on Human Rights.

¹⁰⁸ "Komnas HAM Minta Anggarannya Tidak Dipotong," Abi Sarwanto, accessed November 8, 2020, <https://www.cnnindonesia.com/nasional/20160607194002-12-136523/komnas-ham-minta-anggarannya-tidak-dipotong>.

¹⁰⁹ "Komnas HAM Sampaikan Permohonan Maaf," Komisi Nasional Hak Asasi Manusia, accessed November 7, 2020, <https://www.komnasham.go.id/index.php/news/2016/11/1/7/komnas-ham-sampaikan-permohonan-maaf.html>.

¹¹⁰ Ken Setiawan, "From Hope to Disillusion: The Paradox of Komnas HAM, the Indonesian National Human Rights Commission," *Bijdragen Tot de Taal, Land en Volkekunde* 172 (2016): 15.

through which this should be done is through changing national legislation to improve the independence of Komnas HAM, both from the standpoint of its ability to exercise jurisdiction, as well as its ability to operate free from government intervention.

Overall, Komnas HAM has already taken an important role in Indonesia in relation to human rights violations, including the problem of the haze crisis. The 5 point recommendations made by Komnas HAM in 2016 focused upon the obligations of the Indonesian government to address the human rights violations. Further, Komnas HAM's declaration in October 2019 that the haze crisis is a 'violation of human rights' involving a systemic failure by the Indonesian government again focuses upon the government's responsibilities. It appears that one major factor in this ongoing systemic failure is the role taken by a large number of corporations, including foreign corporations. The complexity of the problem means that individual mediations can be limited in scope, and the government's ability to prevent human rights violations is undermined by the power and influence of the corporate actors involved. All of these factors suggest that a national human rights investigation into corporate responsibility for the haze crisis by Komnas HAM would be appropriate. However, the fact that foreign corporations are involved or their subsidiary companies may create difficulties for Komnas HAM in asserting its human rights jurisdiction over these powerful corporate actors. Within this context, Komnas HAM would need to consider existing and emerging international law relevant to its human rights jurisdiction.

In light of the UN Guiding Principles, it is clear that Komnas HAM is required to provide an effective and appropriate forum for the victims of the haze crisis. Principle 27 provides support for the view that a complaint concerning the responsibility of corporate actors for the haze crisis should be investigated by Komnas HAM. As discussed above, the UN Guiding Principles make clear that all business enterprises 'regardless of their size, sector, location, ownership, and structure' have the responsibility to respect human rights.¹¹¹

In this context, Komnas HAM and the Institute for Community Advocacy Studies (Elsam) launched the Business and Human Rights Action Plan (BHRAP) in Jakarta in 2017,¹¹² six years after the United Nations issued the UN Guiding Principles on Business and Human Rights (UNGPs). The BHRAP was made into law through Komnas HAM Regulation Number 1 of the Year 2017.¹¹³ The BHRAP has four main objectives: 1) produce a consensus among major stakeholders on the application of the UNGPs, 2) create a national standard and guidelines to guide corporate behavior regarding human rights issues, 3) guide the government in developing relevant policies, and 4) focus on prevention and remedy for human rights abuses committed by businesses.¹¹⁴ Komnas HAM has resolved to implement this Action Plan for any further human rights cases that it handles.¹¹⁵

¹¹¹ United Nations, Office of the High Commissioner on Human Rights. *Guiding Principles on Business and Human Rights*. HR/PUB/11/04 (2011), Principle 14.

¹¹² "Rencana Aksi Nasional Bisnis dan Hak Asasi Manusia," Komnas HAM, accessed November 15, 2020, [https://www.komnasham.go.id/files/20180214-rencana-aksi-nasional-bisnis-dan-\\$DH79.pdf](https://www.komnasham.go.id/files/20180214-rencana-aksi-nasional-bisnis-dan-$DH79.pdf).

¹¹³ Indonesia, *Peraturan Komnas HAM tentang Pengesahan Rencana Aksi Nasional Bisnis dan Hak Asasi Manusia (Komnas HAM Regulation on the Ratification of a National Action Plan on Business and Human Rights)*, Peraturan Komnas HAM No. 1 Tahun 2017, Berita Negara No. 856 Tahun 2017 (Komnas HAM Regulation No. 1 Year 2017, SR No. 856 Year 2017).

¹¹⁴ "National Action Plan on Business and Human Rights," Komnas HAM & ELSAM, accessed November 15, 2020, [https://www.komnasham.go.id/files/20180214-national-action-plan-on-bussiness-\\$0PU500.pdf](https://www.komnasham.go.id/files/20180214-national-action-plan-on-bussiness-$0PU500.pdf).

¹¹⁵ Komnas HAM & ELSAM, "National Action Plan on Business and Human Rights," Art. 2.

The Action Plan clarifies that in the event of human rights violations by businesses, Komnas HAM can perform functions of analysis, education, supervision, and mediation.¹¹⁶ In addition, Komnas HAM can perform human rights assessments over business entities operating in the territory of Indonesia, through the performance of an assessment of the internal policies of business entities, human rights due diligence, the provision of individual remedies, and periodic reports to examine the commitment of business entities in upholding human rights.¹¹⁷ Furthermore, Komnas HAM may “demonstrate its appreciation” for business entities with a proven commitment to upholding human rights.¹¹⁸

It is worth noting that Indonesia is the first country in Southeast Asia to launch a national action plan on business and human rights. This is a clear important step to improve the promotion of human rights in the country. However, it is important to note that the form of regulation that underlies the BHRAP, a Komnas HAM regulation, does not have actual public regulatory powers given its lack of recognition as such in Indonesian law, and the lack of both a publicly binding, hierarchically superior law mandating its existence, as well as Komnas HAM’s lack of powers to make such a publicly binding regulation.¹¹⁹ This is also recognized in the Komnas HAM regulation itself, where Article 2 paragraph 2 states that Komnas HAM shall work with ministries/institutions to develop the BHRAP into binding law.¹²⁰ In addition to this formal requirement, further binding regulations are also needed to further strengthen this National Action Plan, given the vast dimensions and dynamics of the Business and Human Rights relationship.

VI. CONCLUSION

In theory, Komnas HAM’s legal framework allows it to exercise jurisdiction over violating corporations in the Indonesian haze crisis, specifically, through the performance of investigations, the issuing of human rights reports, the provision of mediatory services. In addition, in assistance to judicial mechanisms, Komnas HAM can provide *amicus curiae* work throughout the course of proceedings. In the past, its practices with corporations in similar issues have also established that it can exercise these powers. However, Komnas HAM’s exercise of jurisdiction does not yield effective results for victims because of the non-binding nature of its recommendations and mediation. In addition, it lacks the power to compel corporations to participate in its investigatory and mediatory processes. Finally, its less-than-transparent practices in recent years have diminished public trust in its works. Therefore, it may very well be the case that even if Komnas HAM exercised jurisdiction over violating corporations, it can only yield trivial results or even no result at all.

Komnas HAM’s Business and Human Rights Action Plan, created in 2017, is an important first step to improving Komnas HAM’s legal framework and reputation by clarifying the concrete steps that Komnas HAM can take in the monitoring of corporations. In addition, substantive amendments to grant Komnas HAM broader, more concrete powers in the monitoring and exercise of jurisdiction over human

¹¹⁶ Komnas HAM & ELSAM, “National Action Plan on Business and Human Rights,” Art. 3(1).

¹¹⁷ Komnas HAM & ELSAM, “National Action Plan on Business and Human Rights,” Art. 4(1)-(2).

¹¹⁸ Komnas HAM & ELSAM, “National Action Plan on Business and Human Rights,” Art. 5(1).

¹¹⁹ Indonesia, *Undang-Undang tentang Pembentukan Peraturan Perundang-undangan (Law on the Formation of Laws)*, UU No. 12 Tahun 2011, Lembaran Negara No. 82 Year 2011 (*Law No. 12 Year 2011, SG No. 82 Year 2011*), Art. 7; 8(2).

¹²⁰ Komnas HAM Regulation No. 1 Year 2017, Art. 2.

rights violations are necessary to ensure that it can effectively provide non-judicial remedies to victims. In this regard, communications between relevant stakeholders – Komnas HAM, the government, civil society organizations, and members of academia, among others, are necessary.

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