

**INDIVIDUAL REPORT**  
**ON THE ISSUE RELATING TO THE ACCESS OF REMEDY**



**TO THE UNITED NATIONS WORKING GROUP**  
**ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL**  
**CORPORATIONS AND OTHER BUSINESS ENTERPRISES**

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*Institute for Policy Research and Advocacy (ELSAM), established in August 1993 in Jakarta, is a policy advocacy organisation with limited association as its legal entity. To actively participate in the efforts to develop, promote and protect civil and political rights and other human rights, as mandated by the 1945 Constitution and Universal Declaration of Human Rights (UDHR), has become ELSAM's driving objective. From the outset, ELSAM has committed itself to developing a democratic political order in Indonesia by empowering civil society through advocacy and promoting human rights.*

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## ELSAM'S SUBMISSION TO THE UN WORKING GROUP ON BUSINESS AND HUMAN RIGHTS RELATING TO THE ACCESS OF REMEDY

This individual report was prepared by the Institute for Policy Research and Advocacy (ELSAM), a human rights organisation based in Jakarta, Indonesia, that concerned with the situation of business and human rights in Indonesia. ELSAM welcomes the opportunity given to contribute to the upcoming report on Access to Remedy prepared by the UN Working Group on Business and Human Rights (Working Group). With respect to the questionnaire presented by the Working Group, ELSAM has prepared the following response.

### 1. What needs to be done to ensure that remedies for business-related human rights abuses are responsive to the experiences and expectations of the rights-holders?

ELSAM observes four fundamental aspects that need to be taken into account whilst responding to the ensurance of remedies for business-related human rights abuses, which are, *first*, strengthening political commitment of the government to properly execute and respect any outcome concluded by the authorized bodies/institutions. Recent situation demonstrates that despite final and binding decision made by the Supreme Court of Indonesia to revoke the environmental permit of PT. Semen Indonesia to operate their business at a geological conservatory zone in Rembang, Central Java. The Provincial Government of Central Java issued a new environmental permit to that corporation to continue its business at the same location.<sup>1</sup> Such lack of government's political wills to respect and obey the law made the available remedy mechanism futile to achieve its goal in protecting the rights and interests of the victims itself, hence violating the third pillar of the UN Guiding Principles on Business and Human Rights (UNGPs).

*Second*, States are also expected to prepare legislations that are capable to ensure individuals, including business enterprises,<sup>2</sup> to prevent as well as to avoid causing or contributing harm to the enjoyment of human rights.<sup>3</sup> This formulation must further followed with the *third* aspect, namely, the capacity building to the relevant stakeholders in mainstreaming human rights in business related activities. Business enterprises are expected to improve their capacity in embodying the universal values of human rights towards their activities through series of human rights trainings and internal grievance mechanism, as evinced in PT. Freeport Indonesia,<sup>4</sup> PT. British Petroleum Indonesia<sup>5</sup> and PT. Sinarmas Agro Resources and Technology (SMART), Tbk.<sup>6</sup> In addition to that, promotion towards the narration on access to remedy for the general public, particularly to the victims of business-related human rights abuses are also equally important to be taken into account.

The *fourth* aspect that needs to be ensured is the allocation of sufficient budgets for the compensation to the victims, as well as for the continuity of remedy mechanism at domestic level *per se*. In this respect, Indonesian government has demonstrated its strong commitment to ensure that the victims of mudflow in Sidoarjo receive speedy compensation from PT. Minarak Lapindo Jaya by providing advance

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<sup>1</sup> The Jakarta Post, "Disputed cement plant in Central Java stays on track", 20 March 2017, <<http://www.thejakartapost.com/news/2017/03/20/disputed-cement-plant-in-central-java-stays-on-track.html>>.

<sup>2</sup> Patricia Rinwigati Waagstein, *Business and Human Rights in ASEAN: A Baseline Study*, (HRRCA, 2013) at 124.

<sup>3</sup> See i.e. Indonesian Law No. 13 of 2006 on Witnesses and Victims Protection, arts.6-7; Indonesian Government Regulation No. 44 of 2008 on Distribution of Compensation, Restitution and Assistance to the Witnesses and Victims; Indonesian Minister of Marine Affairs and Fisheries Regulation No. 2/PERMEN-KP/2017 concerning Requirement and Mechanism of Human Rights Certification for Fisheries, Art.2(2).

<sup>4</sup> See <<http://ptfi.co.id/en/csr/human-right>>.

<sup>5</sup> See <[http://www.bp.com/en\\_id/indonesia/sustainability/society.html](http://www.bp.com/en_id/indonesia/sustainability/society.html)>.

<sup>6</sup> See <<https://www.smart-tbk.com/en/berkelanjutan/standar-sertifikasi/ungc/>>.

payment to the victims, whilst the company disbursed the aforementioned expenses directly to the government.<sup>7</sup>

## **2. How should states combine preventive, redressive and deterrent elements to enhance the overall effectiveness of remedies?**

Taking into account to the domestic practices in Indonesia, ELSAM identifies two strategies in collaborating the preventive, redressive and deterrent elements of effective remedies. The first and foremost is the incorporation of inclusive mechanism on the prevention, redression and deterrent business-related human rights abuses to the National Action Plan on Business and Human Rights (NAP-BHR), such as the NAP-BHR of Indonesia that currently being prepared by ELSAM and the National Commission on Human Rights (Komnas HAM), which incorporates agenda related to Pillar III of the UNGPs into that plan.<sup>8</sup>

Furthermore, another avenue that States may pursue is through the creation of a joint task force that consist of relevant ministerials and governmental institutions, business associations, financial institutions, civil society organisations, academia, and victims. This task force will hold the mandate to ensure the victims' access to remedy is properly executed. Although not identical to this proposal, similar practice has been seen previously on environmental case in Indonesia, where the Indonesian President formed the Sidoarjo Mudflow Settlement Board (BPLS) in 2007 in order to overcome mudflow, treat mudflow, as well as to overcome social and infrastructural problems attributable to mudflow in Sidoarjo, which was caused by PT. Minarak Lapindo Jaya's drilling activities, by observing the smallest environmental risk.<sup>9</sup>

## **3. What should be the role of home as well as host states of business enterprises in providing access to effective remedy for victims of business-related human rights abuses?**

Centrally, the role of the host and home States are differentiated at the level of foundational principles.<sup>10</sup> Pursuant to the Foundational Principle 1 of the UNGPs, host States must undertake appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication. Meanwhile the duty of the home States is to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction are respected human rights, as required under the OECD Guidelines on Multinational Enterprises and the 2015 G20/OECD Principles on Corporate Governance.

On its development, whenever the host States unable or unwilling to provide effective remedy to the victims of business-related human rights abuses committed by the Multinational Enterprises (MNEs) domiciled in the home States territory, the latter is also entitled to request these MNEs to provide appropriate reparations to the victims, as a form of its liability. Historically, this precedent appears in the United States when the Supreme Court of Louisiana accepts the petition prepared by Yosefa Alongma, an Amungme tribe native in Papua, against PT. Freeport Indonesia [the subsidiary branch of

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<sup>7</sup> Indonesian Ministry of Finance, "Government gives Loan to Lapindo, Victims of Sidoarjo Mudflow to Receive Compensation Immediately", 13 July 2015, <<https://kemenkeu.go.id/en/Berita/government-gives-loan-lapindo-victims-sidoarjo-mudflow-receive-compensation-immediately>>.

<sup>8</sup> The Jakarta Post, "Komnas to launch rights guidelines for business", 20 January 2016, <<http://www.thejakartapost.com/news/2016/01/20/komnas-launch-rights-guidelines-business.html>>.

<sup>9</sup> See Indonesian Presidential Regulation No. 14 of 2007 on the Sidoarjo Mudflow Settlement Board, Art.1(2).

<sup>10</sup> Wouter Vandenhoe, "Contextualising the State Duty to Protect Human Rights as defined in the UN Guiding Principles on Business and Human Rights", 2 *Revista de Estudios Jurídicos* 12, (2012) at 4.

the Freeport McMoran Gold and Copper, Inc. that is based in New Orleans, Louisiana] for committing human rights violation against the Amungme tribe in Papua, Indonesia.<sup>11</sup>

Furthermore, another measures that can be done by the host and home States in providing access to effective remedy for the victims is through the inclusion of specific clause relating to the effective remedy mechanism for the activities of MNEs in host States' territory, under their Bilateral Investment Treaties (BITs) or the Treaties with Investment Provisions (TIPs).

**4. Please provide any additional comments, suggestions or information which you think may be relevant for the Working Group's forthcoming report on access to effective remedy for business-related human rights abuses, or for strengthening access to remedy generally.**

Another recommendation that ELSAM wishes the Working Group to address on the forthcoming report on access to effective remedy is concerning to the utilization of regional human rights mechanism. In some regions there are solid regional human rights mechanism that can be used to enrich the references at the forthcoming report. However, ELSAM also realizes that there are another regions where regional human rights mechanism remains defective. In ASEAN, the narration of human rights, particularly to the right of an effective and enforceable remedy, to be determined by a court or other competent authorities, for acts violating the rights granted to that person by the constitution or by law, has been acknowledged and adopted in the ASEAN Human Rights Declaration.<sup>12</sup>

In light of the spirit to promote and uphold the enjoyment of this right and human rights at large across Southeast Asia nations, ASEAN has equipped himself by establishing various bodies, such as, ASEAN Intergovernmental Commission on Human Rights (AICHR), ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC), and ASEAN Committee on Migrant Workers (ACMW). Notwithstanding with their limited mandates, to the very least, the Working Group may collaborate with these bodies in mainstreaming UNGPs, including the third pillar on access to effective remedy. In fact, strong commitment from ASEAN bodies in mainstreaming the notion of business and human rights has been demonstrated from AICHR's Thematic Baseline Study on CSR and Human Rights in 2014.<sup>13</sup> ELSAM perceives that this modality can be used for AICHR to cooperate with the Working Group in developing another study relating to the business and human rights, including the topic of access to effective remedy.

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<sup>11</sup> Amiruddin and Aderito Jesus de Soares, *Perjuangan Amungme: Antara Freeport dan Militer*, (ELSAM, 2003) at 184-194 (available in Bahasa Indonesia).

<sup>12</sup> ASEAN Human Rights Declaration, (2012) para.5.

<sup>13</sup> See <<http://aichr.org/documents/>>.