KOMISI NASIONAL HAK ASASI MANUSIA

REPUBLIK INDONESIA

PELANGGARAN HAK ASASI MANUSIA DALAM KASUS EKS LUBANG TAMBANG BATU BARA DI KALIMANTAN TIMUR



Sumber Foto : Tim Drone JATAM KALTIM 2016

TABLE OF CONTENTS

TABLE OF CONTENTS LIX

INTRODUCTION LXI

FOREWORD LXIII

Drafting Team LXVII

I. PREFACE 69

DESCRIPTION OF MINING INDUSTRY IN EAST KALIMANTAN 69

II. LEGAL BASIS: 73

a. Mining 73

b. Human Rights 74

III. FINDINGS 77

A. List of Casualties 77

b. Environmental Impact 91

Water Quality 91

Coaldust 92

c. The Response of the Government and the Police 93

IV. LEGAL AND HUMAN RIGHTS ANALYSIS 97

A. LEGAL ANALYSIS 97

Disobedience towards Regulations and Local Law 97

Lack of Supervision led to the Destruction of the Environment and Death 100

Human Rights Analysis 102

B. The Relevance of Human Rights in the Mining Sector 102

C. Human Rights Analysis 104

V. CONCLUSION AND RECOMMENDATION 117

A. CONCLUSION 117

B. RECOMMENDATION 117

General Recommendation 117

Specific Recommendation 118

LEGAL MATERIALS 121

INTRODUCTION

This book is drafted by National Commision on Human Rights (Komnas HAM), Jatam, and the Coalition for Advocating Against Mining Pit Cases based on many years advocacy. The advocacy itself, which conducted by institutions that involved in the Team, aimed for exposing facts upon serious impact of corporate action in mining sector in East Kalimantan.

Up until the formulation of this book, at least 25 people, mostly children, had to died as the consequence of environmental degradation which caused by the change of landscape countour due to mining activity. This condition can be prevented if the the pit immediately backfilled in order to restire environment and to provide security for local residents

The neglience of government and corporation can be shown in this book, particularly in chapter III, through describing chronology and exposing identities of the victims. This books also illuminate several efforts that being made by the family of the victim to obtain justice which have never been able to be realized.

Hopefully, this book can inform the real situation that experienced by the victim and also the environmental degradation that caused by mining industry. Hence, in the future we will be able to create constructive path for restoring the righs to get justice for the victims and also environmental recovery effectively.

Jakarta, 27 June 2016

Drafting Team

FOREWORD

National Commission of Human Right (Komisi Nasional Hak Asasi Manusia, Komnas HAM) noted that in 2008, there were 748 cases of corporation or 18% of the total cases that went to Komnas HAM. In 2010, the amount of cases that received by Komnas HAM that related to corporation increased into 976 cases. These corporation-related-cases dominated by the conflict on natural resources.[1]

With regard to complaint data and the authority of Komnas HAM compatible with the article 89 of law no. 9 on 39/1999 on Human Right, through its plenary session, recommend an establishment of special task force to monitoring the conflict on natural resources. This task force has been worked in early 2016 through generating data, facts and information in certain area which considered as the area where the complaints came from. In accordance to the natural resources issues that divide in several section like plantation, mining and forestry, Komnas HAM also cooperate with several NGOs that active conducting advocacy with the local people that involved in the conflict.

In this East Kalimantan report, Komnas HAM cooperates with Koalisi Lawan Lubang Tambang (Against Mining Pit Coalition), conducting special monitoring to the location of former coal mining in which generated the death of 25 peoples. The majority of the victims were children drowned in the used mining pit. These used mining pits left open without fences or notification board. Although, according to the existing rules the mining company has to conduct post mining. The second thing, these used mining pit relatively close with the residential area, which then might led to an assumption that some mining licensed were issued without strong consideration and feasibility study before.

This report that was drafted with Koalisi Lawan Lubang Tambang not only tried to capture the facts that occur in East Kalimantan, but also this report indicate some strong violation of Human Rights which conducted by company and local government as the licensor. This report also include several recommendation to

[1] Komnas HAM Report

all mining stakeholder that hopefully will be implemented to protect, respect, and fulfil human right where Indonesia become one of the signer of United Nation Guiding Principles on Business and Human Rights (UNGP`s).

Jakarta, October 2016

Komisi Nasional Hak Asasi Manusia (National Commission of Human Rights)

Natural Resources Team

STATUS OF THIS REPORT

This report is the result of observation conducted by National Commision of Human Rights (Komnas HAM) over alleged human rights violation in East Kalimantan. This task defined according to two functions and authority of Komnas HAM which regulated under the Law no. 39/1999 on Human Rights article 89 paragraph 3 and 4 which reads as follow:

Paragraph 3. To implement the function of Komnas HAM for observing as mentioned in article 76, Komnas HAM has duty and authority to:

a. Observe the implementation of human rights and prepare a report on the observation.
b. Investgation and inquiry over emerging event within the society in which the nature and the scope can be considered as human rights violation.
c. Interpelation towards the complainant or victim nor complained parties to held and heard its testimony.
d. Summoning witnesses for asking their testimony, and for the witness complainat asked for providing needed evidence.
e. Reviewing the scene and other places that considered necessary.
f. Summoning related parties to provide affidavits or submitting required document accordance to the original with the approval of chief of court.
g. Investtigation over places such as home, yard, building, and other places which inhabited by certain parties with the approval of the chief of court.
h. Giving opinions according to the approval of the chief of court over certain cases which is in the process of judicature. when in the cases discovered human rights violation as public concerns, the court should examine the argument of Komnas HAM which shall be notified by the judge to the parties.

Paragraph 4. For implementing the function of Komnas HAM in mediation as defined in article 76, the task and authority of Komnas HAM are:

a. Mutual peace agreement between both sides.
b. Case resolution through consultation, negotiation, mediation, conciliation, and expert assessment.
c. Provide suggestion for all parties to resolve dispute through court.
d. Giving recomendation over some case of human rights violation to the government which has to be acted upon its completion.
e. Giving recomendation over some case of human rights violation to the parliament which has to be acted upon its completion.

Beside above these two articles of the law, Komnas HAM also attached to other commitment of the government of Indonesia as a signed country of United Nation Guiding Principle on Bussines and Human Rights (UNGP's).

This report also include several recommendation for related parties, such as the government and mining corporations. Komnas HAM urged related parties to implement the recommendation to avoid any new victims and to ensure justice and recovery for current victims.

THE VIOLATION OF BASIC RIGHTS IN THE CASE OF FORMER MINING PIT IN EAST KALIMANTAN

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Cover Designed by Deden Pramudyana and Komnas HAM

Published in 2016

THE VIOLATION OF BASIC RIGHTS IN THE CASE OF FORMER MINING PIT IN EAST KALIMANTAN

I. PREFACE

DESCRIPTION OF MINING INDUSTRY IN EAST KALIMANTAN

In Indonesia, East Kalimantan is a province that rely economically on coal. There are 1448 mining license known as IUP (Izin Usaha Pertambangan, License for Mining Business). IUP is issued by local government, both provincial and regency/city government.

Besides IUP, there is other mining license which issued by the national government through the Ministry of Energy and Natural Resources (Kementerian ESDM) which called as Cooperation Agreement on Coal Mine (Perjanjian kerjasama Pertambangan Batubara, PKP2B). In East Kalimantan, there are 33 PKP2B. The total land that permissible for mining through IUP is 5,4 mio acre, plus permission through PKP2B is 1,8 mio acre. Totally, the land that allowed for mining is around 7,2 mio acre, from whole East Kalimantan soil which around 12,7 mio acres. It can be said that through this process, 70% of land in East Kalimantan has been pegged as mining area. This fact hasn't been compiled with other exploitation of commodity lincense such as License for Logging Concession Business Sector (Izin Usaha Pengusahaan Sektor Perkayuan, IUPHHK-Kayu), oil and gas work area (Wilayah Kerja Minyak dan Gas), Industrial forest until License for Palm Plantations, thus all land in East Kalimantan has been used for mining.

City of Samarinda is one of many cities that has been assigned by the Ministry of ESDM as an area for mining business. Through this decision, local government of Samarinda introduced management policy on coal mine according their authority. Mining and Energy Services of City of Samarinda documented from 2014, there were 5 PKP2B which issued by the national government,1 IUP by provincial government, and 63 IUP issued by City of Samarinda government. With each land area reached 33,48% for PKP2KB, 32,5% for Province's IUP, 38,37% IUP for City of Samarinda. The land coverage for mining in City of

Samarinda is about 71% from all total land. As the capital of the Province of East Kalimantan, Samarinda has distinct characteristic with other regency/city in East Kalimantan which also has potential for coal mining.

Number of population of Samarinda can be considered as the haighest in East Kalimantan. According to 2010 sensu, the number of Samarinda's population has reached 727.500 peoples. high number of population combined with large mining activity, leaving only 5% for open green area. This contradict with the regulation no. 26/2007 on Urban Planning which mandate minimally open green area 30% of all city land. Through this perspective, natural landscape or ecological condition of Samarinda closes up the possibilit for further mining license, which directly will extent the land area for mining business.[2]

The consequence of this "obral izin" (license saleout) is creating overlapping area between mining area with residential area. the common case that usually found from this overlapping is the issue of former mining pit which left toxic water that containedd with heavy metal. Former mining pit also facilitates casualties which many children has to fall into those former mining pit. Until June 2016, there are 24 people (22 of the are children)[3] become the victim of former mining pit. 15 children fall in City of Samarinda, 8 children fall in Kutai Kertanegara, and 1 person in Pasir Panajem Utara.

Each of the death event in the mining pit rarely fully resolve in the legal process. If there is a cased that resolved, the penalties are too light. As the case of Ema and Eza in which the resolution only sentenced for 9 month. While the other cases remain untouched by the court.
The lack for the remaining cases resolution which related to these former mining pits was caused by the lack of commitment of may parties. The task to pursuit justice rarely finished by the police, corporation, until the government, from provincial even to ministrial level. Lack of good will to preserve the environemnt

[2] JATAM Database East Kalimantan, 2011-2015.

[3] From these 24 death victim, 1 victim named M. Arham (5 years old) found dead burned in the stack of the used coal.

from the danger of coal mining, especially to the furure of the Samarinda's childern can be considered as the main reason on why such cases repeated for five years.

II. LEGAL BASIS:

a. Mining

1. **Law no. 4/2009 on Mining, Mineral and Coal,**

Article on violation against public law in this law can be referred to article 98 paragraph 1 in that mention each person who deliberately enact any acticity resulting surpass of air ambient quality, water quality, sea-water quality, or any fix criterion of environmental destruction, will be subjected to the term of imprisonment for about 3 (three) years and a maximum 10 (ten) years and fined at least Rp. 3.000.000.0000 (three billion rupiah) and at most Rp. 10.000.000.000 (ten billion rupiah).

An act against the law is an act caused by an action and there are rules that regulates this action. Like reclamation and post-mining, there are rules and regulatiion that have to be conducted and implemented. If it does not implemented, there are consequence that regulate such act if such act considered as an act against the law.

2. **Law no 32/2009 on Conservation and Management of Environment.**

Article 97 law no. 32/2009 on Conservation and Governeance of The Environment stated:

(1) "violation against public law in this law can be referred on article 98 paragraph 1 in which each person who deliberately enact any acticity which resulting surpass of air ambient quality, water quality, sea-water quality, or any fix criterion of environmental destruction, will be subject to the term of imprisonment for about 3 (three) years and a maximum 10 (ten) years and fined at least Rp. 3.000.000.0000 (three billion rupiah) and at most Rp. 10.000.000.000 (ten billion rupiah)."

(2) If such act defined by paragraph 1 cause serious wound or death, it can be punished by imprisonement at least 5 (five) years and maximum 15 (fifteen) years and fined minimally Rp. 5.000.000.000 (five bilion rupiah) and maximally Rp. 15.000.000.000 (fifteen billion rupiah)

3. **Government Regulation (GR) no. 78/2010 on Reclamation and Post-Mining**

Article 2 Pasal 2 GR no. 78/2010 stated that IUP's exploration licence holder and IUPK exploration have the obligation to conduct reclamation,

(1) "Holder of post post-production IUP and IUPK production operation holder oblige to conduct reclamation and post-mining"

Article 21 GR no. 78/2010 on Reclamation and Post-Mining

"the implementation of reclamation as defined by article 19 and 20 shall be made no later than 30 (thirty) days after no mining activity in the damaged area"

In the GR no. 78/2010 on Reclamation and post-mining in artcile 2 paragraph 1 contained a mandatory clause as in article 21. This mandatory clause means that any businessman or the holder of IUP Exploration and IUPK Exploration oblige to conduct reclamation. IUP Prodcution Operation holder and IUPK Production Operation have to conduct reclamation and post-mining.

In the regulation clausul, obligation means that it has to be done, and if its not done then there are sanction which regulate such action. In reclamation and post-mining there is administrative sanctiion. Administratvice sanction in this case includinc written warning, temporary suspension, revocation of IUP, IUPK, or IPR.[4] In the sacntion that has been given, does not eliminate the obligation of the business holder to conduct reclamation and post-mining. [5]

Administrative sanction issued by the government as the supervisor in accordance to its authority in the article 50 on administrative sanction. as mentioned on paragraph 1, this sanction released by Minister, Governor or regent/Major in accordance of its authority.[6]

***b*. Human Rights**

Human rights law no explicitly explained the responsibility of corporation to respect, protect and fulfil human rights. However, although it is not explicitly mentioned, not necessarily national law on human rights not provide basic

[4] Article 50 paragraph 2 GR No. 78/2010 on Reclamation and Post-Mining

[5] Article 50 paragraph 3 GR No. 78/2010 on Reclamation and Post-Mining

[6] Article 50 paragraph 4 GR No. 78/2010 on Reclamation and Post-Mining

obligations that have to be enacted by the corporation with relation to respect and protect human rights. In several provision, human rights law give responsibility for anyone, including corporation or business actor, to respect and encourage rights fulfilment which recognized in human rights law.

In the 1945 Constitution rticle 28J paragraph 1 stated

"every men oblige to respect human rights of other people in orderly social life of the nations and the state."

In Law no. 39/1999 in the part of consideration letter b stated:

"human rights is a natural basic rights adhere to the life of men, it is universal and imperishable, therefore has to be protected, respected, maintained and can not be ignored, reduced, or dispossessed by anyone"

Further in article 67 strengthen the part of consideration letter b which stated:

"every men that located in the territory of the state of Indonesia bound to obey to its regulation and law, unwritten rule, and international laaw of human rights which alreaddy accepted by the state of the Republic of Indonesia."

"obligation and responsibility for the fulfilment of the human rights mainly is the obligation of the government",

As regulatedd in article 8 and 71 Law no. 39/1999 on Human Rights.

Indonesia, as stated in 1945's Constitution, has the obligation to respect, protect, and uphold human rights. This notion strengthen with ratification of 7 international related to human rights which derived from several laws. One of them is law no. 39/1999 on human rights which explined that the government has obligation and responsibility for respecting, protectifng, erecting and promoting human rights.

The cases of the death of 24 people in the former mining pits should become the responsibility of the corporation that operated in the area. however, in the human rights document mentioned that human rights responsibility subjected to the state, which make the human rights intrument should be attached with other related regulation.

Based on *United Nation Guiding Principles on Business and Human Rights*, there are 3 (three) pillars in the document that can be utilized for this issue. These principle set norms and framework on corporate responsibility towards human rights. These principles basically consist of 3 distinct-but-related pillars, such as:

1. State responsibility to protect human rights, where the govrenment has to protect individual from any violation of human rights by the third parties, including business entity;
2. Responsibility of the corporation to resect human rights, which means doesn't violate any human rights which recognized internationally through avoiding, reducing, and preventing any negative impact of corporate operation; and
3. The needs to extend access for the victim to get effective recovery, either with judicial mechanism or non-judicial.

Based on Ruggie's principles, state has responsibility to protect human rights, in which the government has to rotect individual from any human rights violation by the thrid parties, including business entity. Ruggie's principle also divide the role of the state and corporation, which through this division enable intertwined distinction between rights-holders and duty-holders that can be changed dependeing to the context.

III. FINDINGS

Based on Komnas HAM investigation from 2011 to 2016, it can be said that there is no serious attempt from the government, either national or local, and law enforcement apparatus to resolve the issue that emerge due to the failure to implement reclamation and post-mining which enable many casualties and environmental destruction.

A. List of Casualties

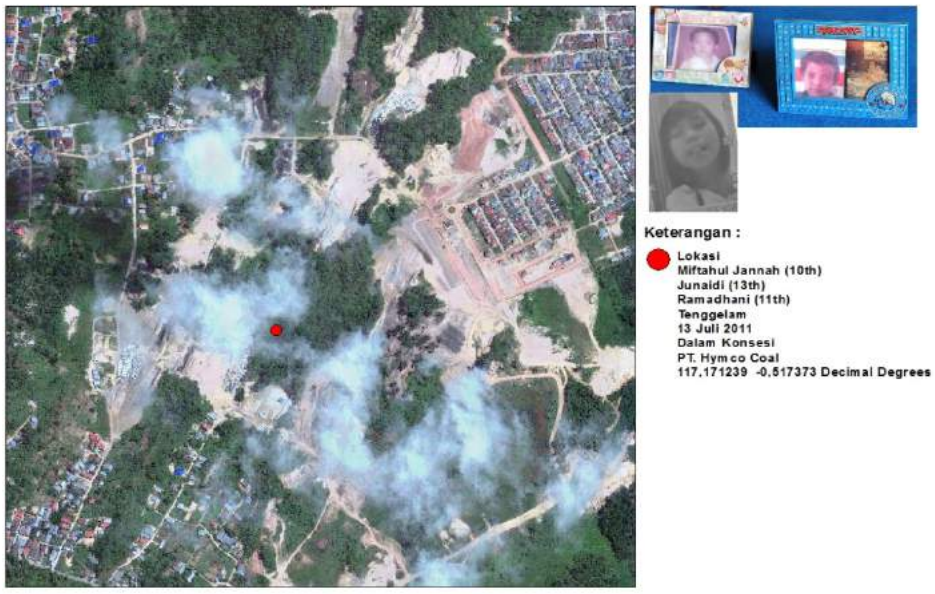
Victims 1-3 : Mimi, Juned dan Rahmad

On July 13th 2011, 3 (three) child named Miftahul Jannah (Mimi), Junaidi (Juned) and Ramadhani (Rahmad) had to die because they fall in a former mining pit owned by PT. Hymco Coal in the Regency of Sambutan, City of Samarinda. Juned and Rahmad themselves were siblings.

Parents of Juned and Rahmad are palm sugar farmer without any ownership on palm tree land. They life in shared land owned by their families, this couples with 10 child has to cooperate to support their family.

There was no legal certainty to the parents and the family of Juned and Rahmad related to their child. Up until now, the legal process is not working while the government with the corporation only responsible to provide compensation in the amount Rp. 15.000.000 (fifteen million rupiah).

Another case with Mimi, a girl which according to East Kalimantan Jatam, one of her families were working in coal mining's corporation. This particular reason made the family didn't want to pursuit the case to the legal process, even it was hard for us to ask for some information. However, this case cannot be ignored by the police since a death of a girl due to mining activity still has to be resolved seriously.



Map Source : Data base JATAM East Kalimantan, overlay map year 2011

Image Source : Reproduction of Family Collection by Didit Haryadi (Jatam East Kalimantan)

Victims 4-5 : Ema and Eza

On December 24th 2011, 2 (two) childs named Emaliya Raya Dinata and Dede Rahmad (6 years) died in mining pit owned by PT Panca Prima Mining in Sambutan District, City of Samarinda. Ema first found in the mining pit, while Eza were discovered after the pit full of water dreged and removed some of its water.

This cases had been carried into legal process until decided by Public Court of Samarinda on January 28th 2013 which resulted that Muhammad Yusuf Ambo Rape (one of the field officer of the corporation) found guilty because his carelessness led to death of a child. This verdict can be considered as too light since those field officer only imprisoned for two month and fined Rp. 1000 (a thousand rupiah). The family only received a compensation for in amount of Rp. 100.000.000,00 (one hundred milion rupiah). In this case, corporate director and supervisor officer of the local government were not prosecuted.

Victim 6 : Maulana Mahendra

On December 24th 2012, Maulana Mahendra (11 years old) reportedly died in one of the mining pit owned by Mr. Said Darmadi which rented to one of mining company, PT Insani Bara Perkasa. Victim died in a mining pit measured around 10x10 metres with depth around 1,5 metres. The former mining pit was located near residential area. it was proven by how easy Maulana with his friends got into the area.

According to the explanation by the victim's parents, there was no attention from the local government and the police to came to the victim's family and triedd to resolve the death of Maulana. The company itself only came to the victim' family and compesante his death for about Rp. 500.000 (five thousand rupiah) which then rejected by the family.



Map Source : Data base JATAM East Kalimantan overlay map year 2012

Image Source : Reproduction of family collection by: Didit Haryadi (Jatam East Kalimantan)

Victim no 7 : Muhammad Fariqi

On January 26th 2016, Mr Fariqi a 14 years old boy and a student in an islamic board school (pesantren) Ibadurrahman drowned ini one of former mining pits owned by PT Kitadin (a local corporation owned by foreign investor, Banpu Thailand).

Victim no 8 : Nadia Zaskia

On April 8th 2014, Nadia Zaskia (11 years old) had to died in former mining pit owned by CV Cahaya Ramadha which was the contractor of PT Energi Cahaya Industritama locate in District Palaran, Samarinda City. Victim at that time was playing with her friend after finished the school. The company didn't compensate anything to the victim's family due to financial difficulties. The police also didn't conduct any investigation to this case.



Map Source: Data base JATAM East Kalimantan overlay map year 2014

Image Source : Reproduction of family collection by: Sarah Agustio (Jatam East Kalimantan)

Victim no 9 : M. Raihan Saputra

M. Raihan Saputra was found dead on December 22nd 2014 after he drowned in a former mining pit owned by PT. Graha Benua Etam. The mining location only distance around 189 metres from residential area. The depth of the pit itself was around 9 metres. The victim died when he was playing with his friends after received his school report. The victim's family had reported to Commission of Environment and Forestry, Commission of Indonesian Child Protection, Komnas HAM and until now the family still tried to get justice through Legal Aid Foundation of Faculty of Law of Mulawarman University.



Map Source : Database JATAM East Kalimantan overlay map year 2014

Image Source : Reproduction of family collection by: Didit Haryadi (Jatam East Kalimantan)

Victim 10 : Ardi Bin Hasyim

On May 25th 2015, Ardi bin Hasym (11 years old) became a victim of former mining pit. He fell to a pit owned by PT Cahaya Energi Mandiri. The victim was found after lost for three days from his home in Jl. Tekukur, Pelita 7, Sambutan, Samarinda City.

To expose this event, the family had reported the death of Ardi to the police and conduct *visum et repreteum* for further investigation in Police office in Samarinda Ilir. However, at least for about a year this case had not been followed up the police.



Map Source : Database JATAM East Kalimantan overlay map year 2015

Image Source : Reproduction of family collection by: Didit Haryadi (Jatam East Kalimantan)

Victim no 11 : M. Yusuf Subhan

On August 24th 2015, M. Yusuf Subhan died in former mining pit owned by PT Lanna Harita Indonesia which the land itself was granted to an Islamic Board School Foundation (Yayasan Pesantren) Tursina. The land was existed side by side with a resindetial area, which the distance between the mosque of the school and the mining pit was only around 210 metres. Until now there is no further legal process. The company itself was owned by a foreign investor from Thailand.



Map Source : Database JATAM East Kalimantan overlay map year 2015

Victim 12 : Aprilia Wulandari

On November 18th 2015, a student of junior high school SMP 25 Loa Bahu named Aprilia Wulandari became a victim of former mining pit of PT Transisi Energi Satunama. The event precisely occurred with the arrival of President Joko Widodo in the Province of East Kalimantan. The body taken directly to public hospotal RSUD A.W Syahrani for conducting visum et repreteum. However, due to the lack of finance, he family decide to cancel the process and.

For the next night, the family was attended by the company with aim to give them compensation ass the expression of condolensces. Only after the incident, the company decide to install a prohibition notice around the pit

which forbid anyone to access the water from the pool. However, up until now there is no legal process for the case by the police.



Map Source : Data base JATAM East Kalimantan overlay map year 2015

Image Source : reproduction of family collection by: Didit Haryadi (Jatam East Kalimantan)

Korban 13 : Koko Dwi Handoko

On December 8th 2015 at 4 o'clock afternoon, Koko Dwi Handoki was found dead in a former mining pit of CV Atap Tri Utama in which the extent of the land is around 2 times of football pitch. The former mining pit itself located in Bentuas, district Palaran, Kutai Kartanegara. The body was able to be found 12 hours after the incident, which in December 9th 2015. In the location of the former mining pit, there was no any notification board, fences or security post. The director of the company did not want to responsible for te case and escape from the location.

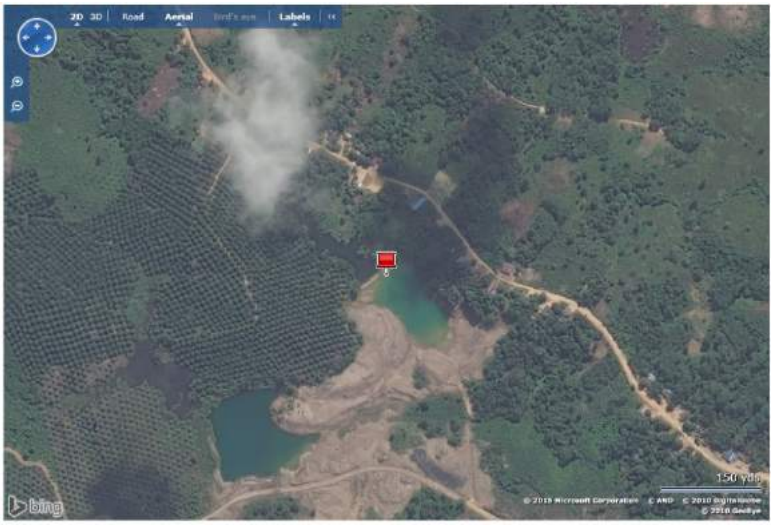


Map Source : Data base JATAM East Kalimantan overlay map year 2015

Image Source : Reproduction of family collection by: Didit Haryadi (Jatam East Kalimantan)

Victim 14 : Dewi Ratna Pratiwi

On December 30th 2015, Dewi Ratna Pratiwi (9 years old) died of drowing in a former mining pit of PT Koperasi Serba Usaha Wijaya Kusuma in Sebbulu District, regency of Kutai Kartanegara. The distance of the pit was only 70 metres, which really close to residential area that made it really dangerous for children. The body was found after 16 hours of searching because of the absence of the rescue team to search the victim.



Map Source: Database JATAM East Kalimantan overlay map year 2015

Victim 19-20: Noval Fajar Selamet Riyadi dan Diky Aditiya

On March 23rd 2016, two senior high school student from SMKN 2 Samarinda, Noval Fajar Selamet Riyadi (16 years old) and his friend Diky Aditya were found death in a former mining pit owned by PT Bukit Baiduri Energi which long abandoned from 1990. Diky was swam first and Noval just watching from the edge since he could not swim. However, due to the slick soil Noval slip to the pit and eventually died.

A member of rescuer team named Rendy conduct searching activity since 4.30 pm in the afternoon and found that it was difficult to do the searching due to lack of diving equipment, and also the day getting late and darker. The searching activity was stop at 8.42 pm. However, the family and the local people decide to continue the searching with traditional equipment. Finally, the body of Noval was found at 11.40 pm. The body was taken directly to the hospital RS Parikesit Tenggaring. After that, the body of Diky was found at 1.15 am which then directly taken to RS Parikesit Tenggarong. In the location of the former mining pit of PT Bukit Baiduri Energi, there was no notification and prohibition board on the activity near the location.



Red : The distance from residential area to the location, 184 metres

Blue : Mining concession PT BBE

Red Spot : Near residential area

Green : Mining concession PT BBE

Map Source : Database JATAM East Kalimantan overlay map year 2016

Victim no 21: Wilson Manggala

On May 15th 2016 at 4 pm, Wilson (17 years old) died after fall in a former mining pit owned by PT Insani Bara Perkasa which located in Purwareja Village, District Loa Janan, regency of Kutai Kartanegara. At that time, Wilsan was playing with his other seven school friends, a senior high school called SMK Kesatuan Yayasan Sumber Mas Baru. The company had given the compensation, but there's no legal effort to resolve this case.



Map Source: Database JATAM East Kalimantan overlay map year 2016

Victim 22 : Kusmayadi

On May 3rd 2016, a 22 years old townspeople of Sambera Baru, District Marangkayu named Kusmayadi drowned in a former mining pit owned CV Panca bara Sejahtera which located at Jl. Ring Road 3 District Samarinda Ulu, Samarinda. This pit located near residential area, which its distance

only 57 metres. CV Panca Bara has mining concession around 123,8 acres and posses 8 former mining pit that had not been closed from 2013.



Source Map: Data base JATAM East Kalimantan overlay map year 2016

Victim 23 : Agus Irawan

On Februari 12th 2016, a villager named Agus Irawan (20 years old) died because sinked in a former mining pit of PT Bumi Energi Kaltim in District Penajam Paser Utara which abandoned since 2010.

The search for victime conducted by the police and the rescue team, and helped by the local people. Due to the seurity reasons, the police and the rescue team temporary stop the searching process at night. However, the family and local people still tried to find the body through rented the boat and anchor. With simple equipment from the local people, finally the body can be found at 3.15 am in 8 metres depth.

The body of the victim was evacuate to the parents house and at 6 am, the body was taken to the hospital for autopsy. At 9 am, the body had been returned to the parent's house to be buried.

Since 2011, the local people had demanded the company to close the former mining pit. However their demand were being ignored. The distance between the mining pit and residential area is around 350 metres and ther were no board of notification and security post to guard the pit.





Map Source : Data base JATAM East Kalimantan, overlay map year 2016

Image Source : Reproduction of family collection by.Didit Haryadi (Jatam East Kalimantan)

Victim 24 : Sanofa M. Rian Gunawan

On August 5th 2015, Sanofa M Rian Gunawan, a 14 years old student of a public junior high school SMPN 1 Tenggarong drowned in a former mining pit owned by PT Cakra at Sebulu Modern Village, District Sebulu, Regency of Kutai Kartanegara. Due to the incident, the family had reported to the sectoral police of Sebulu and encouraged for searching the victim's body by the rescue tea.

LIS OF CASUALTIES OF FORMER MINING PIT IN EAST KALIMANTAN

NO	Company	Victim	Location	Date of Event
1	PT. Kitadin	Muhammad Fariqi (14)	Bangun Rejo Village, District Tenggarong Seberang	January 26th 2012
2	PT. Bara Sigi Mining (BSM)	Sanofa M Rian (14)	Sebulu Modern Village, District Sebulu	August 5th 2015
3	PT Muliana Jaya	Budi Maulana (11)	Kelurahan Jawa District Sangasanga.	August 2013
4	PT. Multi Harapan Utama (MHU)	Mulyadi (15)	Kelurahan Loa Ipuh Darat, District Tenggarong	December 16th 2015
5	KSU Wijaya Kusuma	Dewi Ratna (9)	Sumber Sari Village, District sebulu	December 30th 2015
6	PT. Bukit Baiduri Energi	Noval Fajar Slamat Riyadi (15)	Bukit Raya Village District Tenggarong Seberang	March 23rd 2016
7	PT. Bukit Baiduri Energi	Diky Aditya (15)	Bukit Raya Village Kec. Tenggarong Seberang	March 23rd 2016
8	PT Kitadin	Unidentified	Tenggarong Seberang	2011
9	PT. Insani Bara Perkasa	Wilson (17)	Purwajaya Village, District Loa Janan	May 15th 2016
10	PT. Hymco Coal	Miftahul Jannah (10)	Sungai Kerbau District Sambutan	July 13th 2011
11	PT. Hymco Coal	Junaidi (13)	Sungai Kerbau District Sambutan	July 13th 2011

12	PT. Hymco Coal	Ramadhani	Sungai Kerbau Dsitrict Sambutan	July 13th 2011
13	PT. Panca Prima Mining	Dede Rahmad (Eza) (6)	Sambutan Idaman Permai, Pelita 2	December 24th 2011
14	PT. Panca Prima Mining/ PD. PAU	Emaliya Raya Dinata (Ema) (6)	Sambutan Idaman Permai, Pelita 2	December 24th 2011
15	PT. Insani Bara Perkasa	Maulana Mahendra (11)	Blok B RT.20, Simpang Pasir, Palaran	December 25th 2012
16	Unidentified	M. Shendy (8)	Sambutan, Pelita 4, Handil Kopi, Blok L No 4	March 14th 2013
17	PT. Energi Cahaya Industritama	Nadia Zaskia Putri (10)	Kel. Rawa Makmur District Palaran	April 8th 2014
18	PT. Graha Benua Etam	M Raihan Saputra (10)	Sempaja	December 22nd 2014
19	PT. Cahaya Energi Mandiri	Ardi Bin Hasyim (13)	Kel. Sambutan	May 23rd 2015
20	PT Lana Harita Indonesia	Muhammad Yusuf Subhan (11)	Sungai Siring	August 24th 2015
21	PT Transisi Energi satunama	Aprillia wulandari (12)	Lok Bahu	November 18th 2015
22	CV Atap Tri Utama	Koko Handoko (16)	Bantuas, Palaran	December 8th 2015
23	CV Panca Bara Sejahtera	Kusmayadi (22)	Samarinda Ulu	May 3rd 2016
24	PT. Insani Bara Perkasa	M. Arham (5) ***(after amputed, Arham gone to 6 times operation which hospitalized for 27 days in RSUD A. Moes)***	Samarinda Ulu	May 6th 2016
25	PT Bumi Energi Kaltim	Agus Irawan (Iwan) (20)	Buluminung, Penajam	Februari 12th 2016

b. Environmental Impact

Water Quality

Usually, the former mining pit from five area of mining concession in Samarinda have low acidity, far below the standard set by the government. From all of the samples, most of them have this low acidity (pH minus).



sumber foto : Dokumentasi Jatam Kaltim, saat sampling air

concentrated heavy metal also contained in all samples that were taken. Common mode that being used by the company to divert this process was by creating tourist area in which the water used for swimming pool or utilize for public toilet, as was done in Kutai Kartanegara. through the company pipes, some water also channeled towards the residential area for the household use. Ita can be said that Health threat like cancer or other degenarative decease are likely to happen.

Sampling Time	Location	pH	TDS (ppm)	Conductivity (µs)
May 10th 2016	PT. Transisi Energi Satunama	5,7	-	
May 11th 2016	PT. Panca Bara Sejahtera	6,9	347	694
May 10th 2016	PT. Cahaya Energi Mandiri	4,1	380	760
May 11th 2016	CV. Arjuna (Lubang Tambang)	7,5	114	228

May 11th 2016	CV. Arjuna (Setling Pond)	6,9	93	186
May 10th 2016	PT. Graha Benua Etam	3,2	89	178

Water Researcher from Jatam East Kalimantan has found that the acidity of water quality from former mining pit of PT Bumi Energi Kaltim in regency of Penajam Pasir Utara on February 13th 2016 was around pH 3.76, which can be considered as dangerous. The number exceeded the standard set by the local government of East Kalimantan under Local Regulation no. 2/2011 on Water Quality Management and Water Pollution Control.

Coaldust

In 2013 alone, there were 8 educational facilities that being impacted by mining, from primary school, junior high school and Islamic board school. In Loa Kulu, Kutai Kartanegara, more than a month, all student has to cooperate to clean their class from coaldust in the dry season and mud in wet season. The environmental impact analysis (known as AMDAL, Analisa Mengenai Dampak Lingkungan) that regulate the distance between mining activity and residential area did not guarantee anything. In Samarinda, for Jatam East Kalimantan to get access to the AMDAL document, they need to firstly sue the government to Publik Information Commission to be allowed by the government.



Image source : Dokumentation of Jatam East Kalimantan

c. The Response of the Government and the Police

Komnas HAM of the Republic of Indonesia has conducted observation over many cases that realtedd to the death of children in the former mining pit since 2012. The result and the recommendatio have been drafted and delifered both to national and local government. However, until now, such cases still repeated, and until June 2016, there were 24 (twenty four) death victims in the usde mining pit and 1 (one) death in the stack of coal. Komnas HAM recommendation got responses from these following parties:

1. Provincial Government of East Kalimantan

Komnas HAM had released a letter No. 1.440/K/PMT/IV/2015 dated Aprlil 7th 2015 which addressed to Major of Samarinda, Head Unit of Mining and Energy of East Kalimantan, Environmental Body of Samarinda, and Chief City Police of Ssamarinda on asking explanation related to the former mining pit in Samarinda which has caused 8 children died.

This recomendation then received a response from Chief of Environmental Body of East Kalimantan through letter No. 660.2/1538/B.I.1/BLH/2015 dated 10 Desember 2015 on Responding the recommendation from Komnas HAM realted to Mining Pit cases which stated:

a) The provincial government of East Kalimantan has relesead necesary regulations and policies, like Local Regulation no. 1/2014 on Conservation and Menagement of The Environment and Governor Regulation of East Kalimantan no. 17/2015 on the Regulation of License Governance in Mining Sector, Forestry and Palm Plantatins in East Kalimantan.
b) Issued a Govenor Circular Letter No. 660.2/4543/BLH/2015 dated August 24th 2015 on Inventarization of Coal Mining Pit located in any City or Regency of East Kalimantan. Although, until the specific deadline (November 2015), only Regency of Paser that had finished its inventarization.
c) Cooperate with the Ministry of Environment and Forestry to follow up the death cases of many children in the mining pit to the public law, in which the administrative process is being proceed by Environmental Body of East Kalimantan.

d) Related to the abandoned mining pit, those cases become the jurisdiction of Environmental Body of East Kalimantan.

1. Regency/City Government

   Komnas HAM RI released letter No. 1.440/K/PMT/IV/2015 dated 7 April 2015 addressed to Walikota Samarinda, on asking explanation with regards to the death incident in the mining pit which cause the death of 8 children. However, there was no response from the addressed government to ensure that such cases won't be repeated.

2. Local Police of East Kalimantan

   Through letter No. R/701/VI/2015/ Itwasdda tertanggal 6 Juni 2015 on responding the letter from Komnas HAM No. 1.440/K/PMT/IV/2015, East Kalimantan Local Police explained that:

   a. From 8 victims, only the report in the name of Miftahul Jannah, Junaidi, Ramadhani, Eza and Ema which obtain follow up. For victim named Miftahul Jannah, Junaidi dan Ramadhani, the legal process is still in examining witnesses. While for Eza and Ema, the police had assign one suspect named Muhammad Yusuf Rambo Ape which the document had been transfered to the District Attorney of Samarinda.

   b. For victim named Mahendra and Zaskia Putri, the police had not followed up because there are on report directly address to the local police. While for victim named Muhammad Raihan Saputra, the family reject body autopsy of the related victim and still in the process of investigation by the police of North Samarinda.

      Due to the repeated accident which related to the dead because of the mining pit, Komnas HAM then release further recommendation No. 3.808/K/PMT/XI/2015 dated November 10th 2015 on Komnas HAM Rekomendation about the cases of the drowning of the children in former mining pit in Samarinda which addressed to Chief of Police of East Kalimantan. This letter then responded by the Chief with the letter No. R/510/IV/2016/Itwasda tertanggal 15 April 2016 on

Following up the recommendation of Komnas HAM on the cases of the drwoning of the children in former mining pit. The Chief explain that:

A) Related to the victim document named Miftahul Jannah, Junaidi and Ramadhani, the Disctict court has returned the document for three times with suggesting investigation over mining and environment expert as witnesses (as directed by Komnas HAM recomendation). the police of East Samarinda then conducting expert witness from Mining and Energy Sevice of Samarinda City. Based of the information from expert witness, the sanction towards the miner that fail to conduct reclamation still limited to a reprimand. If the miner left the mine without any reclamation, the license will be used to appoint a third parties that has capacity to conduct reclamation. Witness from Environment Service of Samarinda City stated that PT Hymco Coal (the company which its former mining pit become the location for the death of Miftahul Jannah) had already built a termporary reserve pool to prevent any water flow to create puddle around residential area. this act was permited because it can be considered as anticipation of any potential puddle.
B) With regards to victims named Eza and Ema, there was a nine months verdict towards the suspect by District Attorney of Samarinda because the suspect had proved guilty as fail to conduct reclamation. Komnas HAM assessed this punishment as too light and did not delifered any deterrent effect. However, Komnas HAM still respected the decision made by the judge since there was a fix decision.
C) For victim named Muhammad Raihan Saputra, there were investigation towards several witnesses from the Chief of Technique PT Graha Benua Etam, Mining and Energy Services of Samarinda City, Mining and Energy of East Kalimantan, and a lecturer from Law Faculty of Mulawarman University. The obstacle that exprienced by the investigator was the victim parents did not want their son to be autopsy. They also fail to fulfil the call from

the police for asking some information as witness. Based on remaining witnesses, the investigator had not decided any suspect because PT Graha Benua Etam had not completed the document.

D) For victim named Ardi bin Hasyim, the investigator faced obstacle because in the location there were notification board which state about not allowing fishing, swimming or playing aroudn the pool and around 5 metres there was a security post. The follow up lan would be the police will conduct further investigation towards a expert witness for public law.

E) With regards to the victim named Noval Mahdiansyah, according from the investiagatio the event of the eath of Noval was concluded as pure accident. The family has write a non-objection lettter won the event of the drowning of ther child. The location where noval drown were owned by PT Apel Biru which already taken over by PT Mutiara Hijau. PT Mutiara Hijau. Although PT Mutiar Hijau has not continued any operation at the site due to administrative issue between these two company and the police can not verified both company because they did not located in Samarinda. The plan for follow up would be invstigating expert witness.

F) For the victim named Yusuf Sofyan, the plice has investigate several witnesses, but no result of investigation that can be concluded the party that can be held accountable. The obstacle for investigation also occur from the family in which they have objection for counducting autopsy over their son’s body. The police also still enact investigation on the land ownership in which the pool existed.

IV. LEGAL AND HUMAN RIGHTS ANALYSIS

A. LEGAL ANALYSIS

Disobedience towards Regulations and Local Law

The minister, governor, and Regent/Majow as part of the government have the auhority for supervising any licensing which issued by them or any lower level of the government, as regulated in the article 6, 7 and 8, Law No. 4/2009 on Mineral Mining and Coal.

The Minister, in this case the Minister of Energy and Natural Resources, accodring to article 139 until 144 Law no. 4/2009 has auhority to supervise any license that issued by the Governor, Regent or Major. The license supervision aim to protection as to prevent any violation that might destruct the environment, quality of life and any loss of the society which caused by mining activity. In this case, the government oblige to be on the watch as the party that issue the license.

Article 71 in law no. 32/2009 on the Environmental Protection and Management stated that:

1) Minister, Governor or Regent/Major as defined by their authority oblige to superise to ensure obedience of the business owner and/or business activity that required under the assignment for the environmental protection and management.
2) Minister, governor or regent/major can delegates their authority to supervise to other officer or tecnical insitution that responsible for environmental protection and management.
3) While doing the supervision, Minister, Governor, or Regent/Major appointed a suupervisory official for the environent which is a functional official.

Articel 71 of law no. 32/2009 explicitly state that the license issuer, in this case the Major of Samarinda, with the Minister of Environment and Natural

Reseources an the Governor, have absolute authority to supervise the mining activity.

Within the authority to supervise, they also have discretion to issued administrative sanction if there are any rule violation conducted by the business or the license holder. These administrative sanction consists of written notification, government imposition, license suspension and even license cancellation. [7]

Article 82 of law no. 32/2009 on the Environmental Protection and Management state that:

”minister, governor, regent/major has the authority to enforce the business owner and/or business activity to conduct environmental recovery due to the pollution and/or destruction of the environment conducted by the businesses”

In implementing sancttion, there is exception if the local government can not delifer administrative sanction, then the minister can taking over and make a decision to issue an administrative sanction.

In the ommision of the case of environmental destruction caused by failure to conduct reclamation and post-mining by the license holder, which concretely enable serious violation over environmental ondition, the the minsiter, in this case the Minister of Environment (or currently a Minister of Environment and Forestry) has the authority to supervise over environmental licensing, as regulate under articel 73 in Law no. 32/2009.

The minister also has the authority to give administrative sanction to the license holder, if the local government deliberately ignore the sanction implementation, as mention in the article 77 in Law no. 32/2009. It is strongly indicated that in the case of PT Graha Benua Etam (GBE) and other 17 mining company which related with to the death of children in the former ming pit, there is neglience of the Local Government of Samarinda and Provincial Government of East Kalimantan to give sanction to these company, which then allowing environmental destruction that led to the death of several children in the mining location.

[7] Article 76 paragraph 2 Law No 32/2009 on the Environmental Protection and Management.

If the the Minister, Governor, and Regent/Major do not conduct its supervisory function as defined by article 71 and 72, the they are subject to public law, which consisten with article 112 in law no. 32/2009.

Article 71 in law no. 32/2009 on the Environmental Protection and Management stated that:

1) Minister, Governor or Regent/Major as defined by their authority oblige to supervise on the obedience of the business owner and/or business activity that required under the provision of the environmental protection and management regulation.
2) Minister, governor or regent/major can delegates their authority to supervise to other officer or tecnical insitution that responsible for environmental protection and management.
3) While doing the supervision, Minister, Governor, or Regent/Major appointed an official supervisor for the environment which is a functional official.

Article 73 in law no. 32/2009 on the Environmental Protection and Management stated that:

"the minister can conduct supervision on the obedience of the business owner and/or business activity in which the license issued by the local government if the government deem that there is serious violation in the environmental protection and management"

Article 77 in law no. 32/2009 on the Environmental Protection and Management stated that

"the minister can implement administrative sanction towards the business owner and/or business activity if the government deem that the local government deliberately ignore administrative sanction toward serious violation in the environmental protection and management"

Article 82 in law no. 32/2009 on the Environmental Protection and Management stated that,

"the Minister, Governor, Regent/Major have authority to enforce the business owner and/or business activity to implement environmental recovery due to the pollution and/or the destruction of the environment throughout business process."

Article 112 in law no. 32/2009 on the Environmental Protection and Management stated that

> *"any authorized official whose deliberately ignoring their task to supervise towards the business owner and/or business activity as ruled under the regulation and environmental license, as defined by article 71 and 72 which cause pollution and/or destruction of the environment that led to loss of human life, is subjected to public law with a maximum imprisonment threat 1 (one) year or paying fine not more than Rp. 500.000.000 (five hundreds million rupiah)."*

Most of the issued Coal mining license do not eligible according to regulation of the Environmental Minister no. 4/201 on Environmental Friendly Indicator for Businesses or Open Coal Mining Activity which the mining acivity supposed to be at the distance of the edge of the pit around 500 metres of the residential area. in reality, most of the distance is below that requirement.

in the location also expose that the company did not follow the technical requirment for mining as mentioned in the decision of the Minster of energy and Natural Resources no. 55/K/26/MPE/1995, in which include the compulsion to erect notification board or any other warning sign in the edge of the pit and there is no security which might led the people to falling in the pit.

Lack of Supervision led to the Destruction of the Environment and Death

the government oblige to conduct supervision to ensure the obedience of the license holder to prevent any loss of life due to environmental destruction. In the case of PT Graha Benua Etam which cause the death of M. Raihan Saputra, the government of Samarinda as the licensor to have license for Mining Exploration no 294/HK-KS/2005 dated July 13th 2005 and license for Mining Exploitation no IUP: 545/267/HK-KS/V/2011 dated May 18th which the allowed to manage 493,7 acre of land. According to the responsibility and authority, the city government of Samarinda, with the Provincial Government of East Kalimantan and The Ministry of Environment, have responsibility to conduct tight supervision to the license holder.

The Government of Samarinda allegedly suffice to comply as legal subject with article 359 of the Book of Public Law and article 112 in law no. 32/2009 on the Environmental protection and Management, since there is "neglience that led to

loss of human life" as written in article of Book of Public Law and article 112 of Law no. 32/2009. This can be argued that in the point on "any authorized official", whose "do not conduct supervision", on "the obedience of the business owner or business activity to uphold the regulation and environmental license", which "led to the destruction of the environment", and "causing the loss of human life" have been fulfilled.

Here, we argued that the government of Samarinda city, with the provincial government of East Kalimantan and Ministry of Environment, in accordance to their authority,[8] can be considered for commiting crime, as stated on article 97 of Law no. 32/2009, that "any act that violate the public law within this law is a crime"

In article 359 of the Books of Public Law

> *"Those who due to their negligence led to the loss of human life, threatened to be imprisoned maximally five years or minimum imprisonment for a year"*

Article 71 of law No. 32/2009 on the Environmental Protection and Management state that,

1) Minister, Governor or Regent/Major as defined by their authority oblige to supervise on the obedience of the business owner and/or business activity that required under the provision of the environmental protection and management regulation.
2) Minister, governor or regent/major can delegates their authority to supervise to other officer or tecnical insitution that responsible for environmental protection and management.

Article 72 in law no. 32/2009 on the Environmental Protection and Management mentioned that

> *"the minister, governor, or Regent/Major with the authority oblige to supervise the obedience of the business owner and/or to uphold the regulation and environmental license".*

Article 112 in law no. 32/2009 on the Environmental Protection and Management stated that

[8] Sebagaimana termuat dalam Pasal 71 hingga 73 UU No. 32/2009 tentang Perlindungan dan Pengelolaan Lingkungan Hidup

"any authorized official whose deliberately ignoring their task to supervise towards the business owner and/or business activity as ruled under regulation and environmental license, as defined by article 71 and 72 which cause pollution and/or destruction of the environment that led to loss of human life, is subjected to public law with a maximum imprisonment threat 1 (one) year or paying fine not more than Rp. 500.000.000 (five hundreds million rupiah)."

Human Rights Analysis

B. The Relevance of Human Rights in the Mining Sector

The natural wealth of Indonesia should be the advantage for the Indonesian people. From Sabang to Merauke, the natural wealth sweep across from the bowels to the surface of the earh. Forestry, plantation, mining, oil and gas, and other resources should be governed for the sake of people's welfare.

As a responsible governance and for increasing people's welfare, then the mining industry (including the unlicensed mining activity) has to be managed according to the principles of human rights which regulated under international and national regulation.

In the article 33, the Indonesia's Constitution strongly stated that "the soil and the water and the natural welath which contained in Indonesia are controlled by the state and will be used for the greater good of people's welfare." this article can be considered as normatification and shaped according to the main ideas of the fourth pargraph of the preambule of the 1945's constitution which aimed to encouraging common welfare and social justice for all Indonesian people. This obviously become the fifth point in the pancasila (Five Principles) which serve as the foundation of the legitimacy of the existence of the nation-state of Indonesia.

Article 33 of the constitution as the basis of the rights of the state control regulates the foundation of economic system and economic activity that desired in Indonesia. However, the article 33 should be connected to the issue of social welfare. Within this idea, the state control over natural resurces shoudl be oriented towards social justice and people's welfare.

Article 33 of the constitution posit the state as regulator and guarantor of people's welfare in which make any attempt for allowing private entity to manage the natural resources in Indonesia, the state should provide strict and clear rules. This is the implicaation of the implementation of the concept of for the common welfare of the peole and still can be controlled by the state. Hence, the existence o the mining industry should guarantee the fulfilment of human rights, espcecially in the aspects of the rights to be safe, aspect of environment, welfare, guaranteeing property rights, law enforcement and other human rights aspect.

The human rights law clearly provide state responsibility, especially the government, to take any suffice legislative measure to preotect human rights, including to prevent or minimize any potential violation of human rights that might led to deprive or reduce the fulfilment of human rights. The state also responsible to ensure that the legislative measures that being taken are adequate to sustain prevention and recovery of human rights violation that conducted by the implementor institution. If the state deliberately took no necessary action to protect and fulfill human rights, then such condition can be considered as human right violation by ommission. If the state deliberately enact human right violation, thus such act can be chategorized as human right violation by commission.

The human rights as mentioned in the article 1 of the law no. 39/199 on human rights state as *"a set of rights entitled to the nature and the existance of human as god's createure and constitute as His gift that should be respected, highly upheld, and protected by the state, law, the government, each person for the honor and protection of human dignity.*"

While human rights violation as menintioned in article 1 number 6 of law no. 39/1999 on human rights is "any act conducted by a person or group inluding state apparatus, either intentional or unintentional, or any negligence that consider against the law that led to reduce, prevent, limit, and or revoke the human rights of a certain person or a group of people that guaranteed by this law, did nor received or feared for not obtain any fair and correct legal settlement, according to the apply legal mechanism."

Regarding to this position, the legal analysis in this report will use the law no. 39.199 on Human Rights and other human rights law in the national level, and refereing to the relevant international law on human rights. The human rights analysis intended to assess the fulfilment of human rights (or not) in the incident of the dead of 24 people, especially children, in the province of East Kalimantan which occur untul June 2016, due to the failure to implement reclamation and post mining in the several former mining pit.

C. Human Rights Analysis

The broad outline of human rights analysis towards the violated rights in this report will utilize some regulations/ laws that regulate human rights such as:

1. 1945's Constitution
2. Law no. 39/1999 on Human Rights
3. Law no. 11/2005 the International Convention on the Economic, Social and Cultural Rights
4. Law no. 12/2005 on international Convention on the Social and Politial Rights
5. Other Sectoral laws such as Law no. 4/2009 on Mining, Mineral and Coal, Law no 40/2007 on Limited Liability Company (Perseroan Terbatas), Law no. 25/2007 on Foreign Capital Investment , and Law no. 32/2009 on the Environmental Protection and Management.

Based on data, facts and field information that gained from several parties, Komnas HAM found that there were 4 (four) forms of human rights violation in the events of the death of 24 (twenty four) people due to drowning in the unclosed former mining pit owned by mining company in East Kalimantan and the dead of man because he was burned accidentally in the stack of coal. The violation consists of:

1. **The Right to Life.**

   The right to life explicitly guarantee in the constitution of Indonesia which listed in the article 28A, "everyone has the right to life and entitled to preserve his/her life and to earn his/her living." Therefore, the right to life is a constitutional right.

The guarantee for the right to life also express in the article 9 paragraph 1 law no. 39/1999 which stated: “everyone has the right to life, preserving his/her life and to improve his/her quality of life.” Also in article 4 of the law 39/1999 mentioned that, “right to life, rights not to be tortured, rights to have free life, mind and conscience, rights to embrace religion, rights not to be slaved, rights to be acknowledged as an individual and equal before the law, and rights not to be executed on the basis of retroactive law are human rights that cannot be reduced by anyone in any circumstances”

Based on the Covenant of civil and political rights, the rights to life is one of the rights that included in the category of absolute rights that cannot be reduced its fulfilment by the states (no derogable rights) although in the state of emergency. Moreover, if such right to life has been revoked due to the carelessness of the company for not fulfiling its obligation to close its own mining pit, then it can consider as the violation of this covenant.

Based on this covenant, the state oblige to respect and guarantee the acknowledged rights of the individual which inhabit its own country and subject to their jurisdiction without discrimination of any kind. Article 6 paragraph 1 of the covenant of civil and political rights mention about the right to life, which “any human have the rights to life that entitled to themselves. This right has to be protected by law. No one shall be deprived of his/her life arbitrarily”

Based on the facts that discovered until June 2016, there were 25 fatalities occured in East Kalimantan, especially children in Samarinda and Kutai Kartanegara. All of these people died of drowning in the former mining pit which did not closed after mining activity finished by the company.

Whereas, either in law no 4/2009 on Mining, Mineral and Coal or in Government Regulation no. 78/2010 on Reclamation and Post Mining explicitly regulate the obligation for reclamation and post mining. There are several important things in Government Regulation no. 78/2010 on reclamation and Post Mining, which are:

a) Article 2 paragraph 1 and 2 stated that ”IUP Holder for Exploration and IUPK holder for Exploration oblige to conduct reclamation” and ”IUP holder for production operation and IUPK for production operation oblige to conduct reclamation and post mining.”

b) Article 21 stated that ”the implementation as defined by article 19 and 20 oblige to be conducted at least 30 (thirty) days of the dated calender after no further mining activity in the operational area”

c) Article 50 paragraph 1 and 2 regulates adiminstrative sanction due to violations of various article stipulated under the Government Regulation no. 78/2008, ”administrative sanction as mentioned in paragraph 1 can be: (a) written warning, (b) temporary suspension for mining activity and/or revocation of IUP, IUPK, or IPR”

The death of 24 people clearly violations of human right, especially the rights to life that guarantee from all human right regulation from Indonesia’s constitution (second amandment), law of Human Rights, the Covenant of civil and political rights, and other sectoral regulation. The right to life become the supreme of human rights which its fulfilment cannot be reduced. Thus, it is imperative for all parties to obey the assigned regulation.

With regards to the death of 24 people in East Kalimantan, the responsibility to protect and fulfil the rights and freedom as defined in the covenant lied in the state. In this situation, the state has the responsibility to prevent any loss of human life to be repeated. the state, through its apparatusses, need to use its force to encourage the legal process in the public , civil, and state adminsitration in order to make the perpretrators (especially corporation) held legally accountable for its action.

2. Right to Life in Healthy and Clean Environment

Various violation of human right in each environmental sector have occured in almost every level of society, especially in the extractive industry. This violation should be understood as a threat towards the civilization of Indonesian people. This situation might led to other

violation of rights such as economic, social, cultural even civil and political rights. The violation on environmental norm will cause catasthrope, which can be natural or men-made, that potentially might endanger the human's life.

Environmental destruction by corporations cause has suffering and human rights violation towards majority of the people. Hence, the right to life in clean, healthy and balanced nature should be posti as part of human rights, which it has not been realized in this case. Although the constitution through article 28H paragraph 1 has guarantee that "everyone is entitled to life in prosperity, inwardly and outwardly, reside and earn in good and healthy living environment and has right to obtain health care." it is also regulate in law no. 39/1999 on Human Rights which in article 9 paragraph 3 mention that "everyone is entitled to a good and health living environment."

In law no. 4/2009 on Mining, Mineral and Coal, clearly regulate this aspect to guarantee and protect environment through several article such as:

a) Article 2 letter d stated that "mineral mining and/or coal should be managed under the principle of (d) sustainability and socially responsible"

b) Article 3 letter b stated that "to support the sustainable national development, the aim of management of mineral and coal is (b) to guarantee the benefit of mineral and coal in a sustainable and environmetally friendly"

c) Article 10 letter b stated that "the appointment of WP as defined in article 9 implented in (b) an interated effort with regard to the opinion from related government institution, community, and with consideration on ecology, economy, and socio-cultural, along with environmentally conscience"

Also in law no. 40/2008 on Limited Liability Company (Perseroan Terbatas, PT) through article 74 paragraph 1 assign responsibility to corporation that "the company that operates its business in the sector and/or related to natural resources oblige to conduct social and

environmental corporate responsibility." in article 17 of law no. 25/2007 on Capital Investmen stated that "capital investor that operate its business in non-renewable natural resources bound to allocate fund gradually for recovering the location that fulfil the eligibility standard of the environment, which its implementation will be regulated under the provision of the legislation."

The obligation of business entity, which also those in mining industry, is to preserve enviironment. The law no. 32/2009 on the Environmental Protection and Management clearly state that company has:

A) Obligation to protect the function of environment along with controling polluiton and/or any environmental damage.
B) Obligation to provide related information on protection and management of environment correctly, accurately, openly, and on time;
C) Obligation to preserve the sustainability of the function of the environment.
D) Obligation to obey the regulation on the standard of the quality of the environmental and/or standard of the quality of the environmental damage.

Corporate responsibility to respect human rights has also been established by United Nation through Manual of Businesses and Human Rights which one of the pillar is the responsibility of the corporation to respect human rights, that necessarily mean as not to violate human rights which internationally recognized by avoiding, reducing, or preventing negative impact from the operation of the corporation.

Based on this, the regulation on human rights and other sectoral regulation has mandated the state to conduct the supervision of the implementation of the regulation. The corporation has obligation to obey every regulation that related to environment and to conduct recovery of impact.

However, in reality these obligation generally not complied by the corporation in which they still ignore their responsibility to implement post mining by not doing recovery and reclamation. Consequently, beside causing the death, this neglect of responsibility has led to environmental pollution, the damage on the structure of the nature (environmenta), damaging the soruce of the living of the local people, especially farm soil, source of water and air etc. Therefore, it is obvious that there is violation of the right to have a good and healthy environment due to the mining activity in East Kalimantan that ignore the environmental aspects of human rights.

3. Right to Security

The guarantee to protect the right to security is not explicitly stated in current regulation. Article 28G paragraph 1 of the 1945 constitution said that ”everyone is entitled to get protection for him/her self, him/her family, him/her honor, him/her dignity and him/her owned property alongside with the right to security and protection from the threat of fear to do or not something, that considered as fundamental right”

This protection strenthen in the article of 29 of human rights law which statedd that ”everyone is entitled to get protection for his/her self, his/her family, his/her honor, his/her dignity and his/her owned property.” right to security then reaffirmed in the article 30 of human rights law which express ”everyone is entitled to security and peace alongside with protection from the threat of fear to do or not to do something.”

Based on the facts in the location and the result of Komnas HAM findings from several parties, Komnas HAM found that there are violation of human rights especially the right to security due to the coal mining activity in East Kalimantan like:

a. The fear and worries of the local people in realation to the death of many children in several former mining pits in the province of East

Kalimantan, especially in Samarinda City and Regency of Kutai Kartanegara.

b. The fear of worries also experienced by local people i which his/her house reside near the coal mining location. Many are just within no more than 10 metres.
c. Fear and worries experienced by the local people whose lifes around the mining. They fear to experience loss of their own life, their family, asset especilly house and sources of living (farmfield/plan/shop) might impacted by the mining activity.
d. Fear and worries if the local people conduct demonstration or rally against coal mining. They fear that the police will criminalize them because they stand against the mining activity or the corporation will use some vigilante group to threat the people.

Based on these facts, it is obvious that the practice of coal mining did not fulfil all the instrument of the regulation and human rights as explained before. This can be said that there is strong indication of human rights violation as regulated in article 28G paragraph 1, artile 29 and article 30 of human rights law, especially the right to security from the aspect of to get *protection for him/her self, his/her family, him/her owned property*. Beside, everyone also entitled to be secured and protected from threat of fear to do or not to do something.

4. Right to Justice

The State of Indonesia is a Law State. According to Stahl, the concept of state law which usually known as “rechstaat” encompass four important element, which are: human rights protection, power sharing, government based on law, and state administrative court. Based on these characteristic of law state, the central idea of law state is the recognition and protection of human rights that founded on the principle of liberty and equality.

With regards to that statement, especially in the element of human rights protection, constitutionally the state of Indonesia has already

guarantee, respect, highly honour and protect human rights. The material that related to the right of everyone to justice mentioned in article 28D 45 constitution which stated that “everyone is entitled to recognition, guarantee, protection and certainty of just law alongside with equal treatment before the law.” Besides that, article 28I paragraph 1 also mention about the right to recognition as a person before the law and this right is a human right that cannot be reduced in any circumstances.

In order to uphold the human rights principles, has also regulated the obligation of a person to respect other person’s human rights alongside with the responsibility of the state to uphold human rights, especially the right to justice. Article 28I paragraph 5 stated that ”to uphold and protet human rights according tho the pinciple of democratic law state, the the implementation of human rights guaranteed, regulated and written in the legislations”

In the law no. 39/199 on human rights express that ”everyone, without discrimination, is entitled to obtain justice through applying complaints or lawsuit, either in the case of public law, civil law or adiministratie law along with prosecuted in free and impartial process, in accordance to the procedural law that guarantee objective invetigation by honest and just judges to obatin fair and right decision.”

To reckon that the extractive natural resources can not be renewed, then any business activity that related to such resources hav to be beneficial for the future generation. As the consequence, the state via the government has to provide supervision and firm sanction to the company that has violated the law no. 4/2009 on Mining, Mineral, and Coal. recalled the authority of the government to enforce the law in accordance to article 158 until 165 which are:

a) Article 163 paragraph 1 stated that ”in the case of criminal offenses reffered to this chapter that carried out by a legal entity, in addition to the imprisonment and fined towards the officer, the punishment can be imposed agaisnt the legal entity which those entity shall be

fined 1/3 (one third) times more than maximum requirment of the imposed criminal fined”

b) Article 163 paragraph 2 expressed that ”in addition to the criminal fined reffered to the paragraph 1, additional penalty might be imposed to a legal entity in the form of: a. The revocation of business license; and/or b. Revocation of the status of the legal entity.”
c) Article 164 stated that ”beside regulation as definedin article 158, article 159, article 160, article 161, and article 162 against the criminal can be imposed additional punishment such as: a) dispossesion of property that being used in the criminal act; b. Dispossesion of profit that gained through the criminal act; and/or c. The obligation to pay the cost that occur due to the criminal act.”

Law no. 4/2009 on Mining, Mineral and Coal then followed by the drafting of government regulations such as; (a) Government regulation no. 22/2010 on Mining Area; (b) Government Regulation on 23/2010 on the Implementation of Business Activity of Mining, Mineral, and Coal; (c) Government regulation no 55/2010 on Guidance and Supervision of the Implementation of Business Management of Mining, Mineral, and Coal.

Referring to these instrumen, all report of the local people, especially that came from the family whose their member become the victim of the ignorance of the corporation to conduct post mining activity (reclamation), can be followed up by the state through their law enforcement apparatusto process the suspect, especially corporation that has violate the regulation that regulate the obligation of the mining company.

However, from the case of the death of 24 people that occur until June 2016, not all report has been followed up until the trial phase in the court. Only 2 (two) events in which cases get trial in the court, the other 4 (four) cases has been investigated. Unfortunatley, the future of the rest cases will remain unclear

In the aspect of state administration law, there is no serious attempt enacted by the government, through the General Directory of Mining and Coal of the Ministry of Energy and Natural Resoruces, to revoke any business license that violate the law. Even the demand of the community and the NGO that encouraging the revocation of license on several company that accused for violating the human rights always met deadlocked.

Based on these facts, although not all of this condition are necessarily reflected the passiveness of the government, with its apparatus such as bureacrats of the ministry or the police, to conduct enforcement authority, the main process suggest that there is lack commitment to law enforcement on the human right issues, especially to fulfil the justice and law certainty that guarantee in the 1945 constitution, law no. 39/1999 on human rights, and other sectoral laws such as law no. 2/199 on the Police of the Republic of Indonesia with the Police Regulation no. 8/ 2009 on the implementation of the Principle and Standard of Human Rights in the Task of Police.

5. Child's Right

Various efforts that addressing the advancement and protection of human rights in In Indonesia has to be considered as strategic interest of the nation-state of Indonesia. Thus, it is imperative for all element of the nations to have priority on how the human right regulation should be enforced. One of human rights regulation that needs to be concerned in this report is the regulation related to child's rights. Child's right strongly defined in the Convention on the Rights of the Child which approved by UN General Assembly on November 20th 1989. Indonesia ratified this convention through Presidential Decision no. 36/2009 on the Ratification of Convention on the Rights of the Child on August 25th 1990

In the *Convention on the Rights of the Child* contain 4 (four) basic principles, which are:

a) Non discriminatory principle, which means that everyone has rights that being recognized and containd in the human rights commission

must be enforced to every child without any discrimination. This principle is the reflection from the principle of the human rights universality;

b) The principle of the best interest of the child, which means that in any act that related to children, then what is considered to be the best for the children should be the main consideration
c) The right to life, survival, and development, which means that it has to be recognized the rights to life of children that entitled to every child and the child's right to survive and develop should be guaranteed;
d) The principle of respect for the views of the child, which means that child's opinion, if it's related to matters that would impact his/her life, needs to be considered to any decision making.

In the national regulation through article 28B paragraph 2 of the 1945 constitution, also affirm the assurance of child's right which, "every child is entitled to life sustainability, grown up, and developed alongside with the right to be protected from violence and discrimination."

This protection also assigned through article 52 of the human rights law that stated that, "every child is entitled to be protected by his/her parents, family, society, and the state." Protection to the child's right, especially the right to life mentioned in article 53 of human rights law which affirm, "Every child from the womb, is entitled to life, survive, and increase his/her quality of life." It is also the protection of child's right regulated by Law no. 23/2002 on Child's Protection.

Based on data, facts, and information gathered from the field, the death of children in the former mining pit shows that:

a. No attempt for securing the former mining pit through reclamation or closing the location.
b. No attempt for securing or evacuating the children who were in the location or in the former coal mining by the company.
c. Based on the existing data, the death of children were the majority

in the number's of victim due to drowning in the former coal mining pit.

d. No serious attempt from the government through their instantion or law enforcement apparatus to close the former mining pit consider there are many opened mining it in the location.

From these findings, it can be said that there is a violation against child's right as guaranatee in the 1945 constitution article 28B paragragh 2, article 52 and 53 of law no. 39/1999 on human rights, and law no. 23/2202 on child's right with the Convention on the Rights of the Child.

V. CONCLUSION AND RECOMMENDATION

A. CONCLUSION

1. There were 22 child and adult that had to be dead because of drowning in the former coal mining pit, and 1 child died because burned in the used stack of coal.
2. The distribution of the victims occured in Samarinda (15 victims), Regency of Kutai Kartanegara (9 Victims) and 1 victim in Regency of Penajam Paser Utara, the Province of East Kalimantan.
3. There is violation of human rights against the right to life, right to have a goo and healthy living environment, right to justice and child's right.
4. There is indication for disregading by the state apparatus, either from the national government and local government as regulated in article 28I paragrapg 4 of 1945 constitution and article 71 of law 39/1999 on Human Rights.
5. the process for law enforcement supposed to be implemented by the police ant other investigator even before the occurence of the deadly event in the former coal mining pit.
6. There is strong indication for a violation of the child's right as regulated on law no. 39/1999 on Human Rights, law no. 35/ 2014 which is a change in the law no. 23/2002 on Child's Protection.

B. RECOMMENDATION

General Recommendation

1. With regards to the mining business, the government has obligation to protec, respect and fulfil human rights as expressed in the Constitution, Law no. 39/199 on Human Rights, the first pillar on the *United Nation Guiding Principles on Business and Human Rights* that had been ratified by the government in 2011.
2. In the mining business, corporation has obligation to respect human rights, especially within its business operation area as regulated in the second pillar of *United Nation Guiding Principles on Business and Human Rights* that had been ratified by the government in 2011. Disobedience of

the company that disrespectful to the rights of local community while oing its business shows that corporations did not conform with the international law and can give the authority for the government to enforce the corporation to fulfil the rights of the citizen that being violated.

3. In the case of the occurance of death or loss as the consequence of the operation of the corporation, then the government an the corporation oblige to implement recovery of the violated rights of the citizens, as regulated in the third pillar of *United Nation Guiding Principles on Business and Human Rights* had been ratified by the government in 2011.

Specific Recommendation

To the Governor of East Kalimantan:

1. Conducting moratorium of mining license, especially in the city of Samarinda, Kutai Kartanegara and Paser Penajam Utara, alongside generally in all province of East Kalimantan.
2. Conducting inventarisation, evaluation, and revoking mining license especially that operate near residential area in the Province of Eas Kalimantan.
3. Urging and ensuring the mining corporations to implement their obligation to conduct reclamation and post mining in the entire area of the Province of East Kalimantan.
4. Firmly sanction the mining corporation that proven to violate the process of exploration, exploitation, reclamation and post mining.
5. Conducting evaluation to 17 company that hold IUP and PKP2B that responsible for the death of 25 people that drownedd in former mining pits or exposed by coal.
6. Providing special unit for accompanying and conducting psychological recovery for the the mother who her children had become the victim of the former mining pits.

To the Chief of Police of The Province of East Kalimantan and his/her Staff:

1. Ensuring profesional investigations and Inquiries against the death of 24 people due to the drowning in several former mining pits in the city of Samarinda, Regency of Kutai Kartanegara, and Regency of Paser Penajam Utara, including 1 death victim that burned in the stack of coal.
2. Conducting legal process to the corporation that violated and ignored its obligation as mentioned in the existing regulation.
3. Coordinating with the ministry and related institution (like Komnas HAM, PPNS Body of Environment, KPAI, KPK, and any others) to use layered legal basis to process these cases.

To The Mayor and Regent:

1. Coordinating and helping the Governor of East Kalimantan in the process of handling, inventarizing, evaluating the existence of mining in each location.
2. Conducting supervision and asking the comany to implementing its obligation for reclamation and post mining in each region.
3. Preventing any potential accident in the former mine site by instructing the company to establish notification board, fences and security post around the mining location.
4. Conducting humanitarian aid by Compensating the victim's family.

To the Minister of Energy and Natural Resources:

1. Evaluating IUP license in forms of PKP2B and IUPK (specifically against 17 mining corporation that has caused the death of 25 people due to the former mining pit), especially evaluating the IUP for Production Operation which managed by the local government, that cause environmental damaged. The evaluation also has to assess the corporations that did not followed the mining regulation in accordance to article 6 paragraph 1 point j law no. 4/2009 on Mining, Mineral and Coal.
2. Following up the monitoring result that conducted by the Commision of Corruption Eradication (Komisi Pemberantasan Korupsi, KPK) on licensing, implementation, reclamation and post mining.

To the Commission of Corruption Eradication

1. Intensified the supervisory process on licensing, implementation, reclamation, and post mining that potentially enable state loss and/or abuse of authority.
2. Continuing coordination and supervision on the management of mining, mineral, and coal.
3. Conducting investigation on the existance of the trust fund for reclamation and post mining from the 17 company that has caused the death of 25 people in their former mining pit.

To the Minister of Environment and Forestry:

1. Conducting inquiries and investigation on the allegation of the environmental damgae that threat the community alongside with the violation of the right to have a good and healthy living evironment in accordance with the article 65 paragraph 1 of law no. 32/2009 on the Environmental Protection and Management.
2. Conducting investigation on the allegation of ennvironmental crime against 17 company that has caused 25 people died of drowning in former mining pits.

To the Corporations:

1. Conducting their obligation to implement reclamation and post mining that coordinated with the government, and others corporate obligations as regulated in the existing regulations.
2. Conducting recovery on the rights of the victims as the realization of the corporate respect to the human rights by implementing its operational activity in accordance with the third pillar of the Guiding Principles on Business and Human Rights as ratified by the Governent of Indonesia in 2011.

LEGAL MATERIALS

1. Law no. 32/2009 on the Environmental Protection and Management;
2. Law no. 4/2009 on Mining, Mineral, and Coal;
3. Law no 40/2007 on Limited Liability Company;
4. Law no. 25/2007 on Foreign Capital Investment;
5. Government Regulation no. 78/2010 on Reclamation and Post-Mining.