



Corporate Responsibility for Environmental Human Rights Violation: A Case Study of Indonesia

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ABSTRACT

The volcano mudflow of 2006 in Sidoarjo, East Java was one of the most devastating environmental disasters in Indonesia. Many argue that it was the failure of PT. Lapindo during the drilling process but the verdict of the District Court of South Jakarta decided that it was a natural disaster. Environmental crime provision is stated in The Environmental Management Act 2009 No. 32 but this stipulation does not reduce the number of corporate environmental crimes as there are other factors involved such as enforcement. The protection of people's environmental human rights is also recognized under The Law of 1999 No. 39 on Human Rights. Regrettably, prosecuting corporate environmental crime from the angle of human rights is at a dead-lock due to the fact that the Indonesian Human Rights Court is only authorized to prosecute genocide crimes and crime against humanity. Nevertheless, the corporate sector should take the responsibility to restore the ecosystem where disasters have occurred. In view of this gap, some primary data, like statutes, regulations and international conventions; also secondary data such as articles, reports and news papers have been obtained from literature study and internet sources and are descriptively and qualitatively analyzed. This article aims to rationalise that the jurisdiction of the Indonesian Human Rights Court should include environmental crime in The Law of 2000 No. 26 in Human Rights Court and provide output for the decision makers in Indonesia to consider that environmental crime is a crime against humanity.

Keywords: Corporate crime, corporate liability, environmental pollution, environmental human rights, Indonesia

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INTRODUCTION

*PT. Lapindo*¹ is the Indonesian oil company which holds a license to explore and exploit the oil resources in Indonesia. *Sidoarjo*, near *Surabaya* is one of its oil drilling sites. The

disaster occurred on 29th May 2006 when *PT. Lapindo* failed to stop the mud flowing from a gas exploration well. Consequently, approximately 10,000 houses and 600 ha of land and villages were submerged, farmland was devastated, businesses and schools closed and livelihoods lost as the mud inundated the surrounding area causing 50,000 people to be displaced.² The mud continued not only to flow from the first rupture, but the daily amount gushing out increased from an initial 5,000 m³ per day to up to 150,000 m³ per day.³ It was reported that the weight of the mud on the ground had pressed down the affected area by approximately one meter deep.⁴

It was a natural disaster claimed some *Lapindo's* experts but many have indicated that it was most likely to have occurred as a consequence of *PT Lapindo Brantas's* failure to install a casing around the well to the levels required under Indonesian mining regulations.⁵ Many lent their assistance to build a two meter high dam, for example the Indonesian subsidiary Dutch Company Van Oord, 1400 army personnel and a team from The United Nations Disaster Assessment and Coordination (UNDAC). That was not a sustainable solution due to the rainy season. Efforts were undertaken by *PT. Lapindo's* technicians to stop the mudflows, but those also failed.⁶ It was predicted that the mudflow was similar to oil deposit which may last up to 30 years.

The disposal into the River Porong and to the sea affected the river ecosystem and the aquaculture industry, and the high level of salinity caused the land

overflowed by mudflow to become infertile. WALHI (*Wahana Lingkungan Hidup*), an environmental organization predicted that the disposal of mud into the river would destroy 4,000 hectares of fish and shrimp ponds and threaten the livelihoods of thousands of fish farmers in Sidoarjo, Madura, Surabaya, Pasuruan and Probolinggo.⁷

As a non-governmental environmental organization, WALHI on May 1, 2007 filed a case to the District Court in South Jakarta and sued *PT. Lapindo Brantas Incorporated* together with 11 other defendants on the ground that the defendants had committed an unlawful act (*Perbuatan melawan hukum*) which caused significant damage to the environment and loss of income to those affected. The District Court of South Jakarta⁸ was not in line with WALHI's argument that *PT. Lapindo* had committed an unlawful act and decided that the hot mudflow was a natural disaster. On the other hand, a report by geologists and scholars concluded that it was not a natural disaster but the failure caused by *PT. Lapindo* during the drilling process.

This article employed some data covering primary data, like statutes and regulations and also secondary data such as articles, reports and news papers. All data collected are analyzed descriptively and qualitatively. The objectives of this article are to provide some input for the politicians and decision makers to consider that environmental crime is a crime against humanity and also to rationalise that the jurisdiction of the Indonesian Human Rights Court should include environmental crime

in The Law of 2000 No. 26 on Human Rights Court. This article is divided into in several parts. The first part deals with the volcano mudflow as described in introduction. The discussion moves on to legal problems relating to environmental human right protection versus economic development in Indonesia as discussed in part two. Part three discusses whether volcano mudflow in Sidoarjo, East Java is a corporate environmental crime. Part four discusses the question of whether corporate environmental crime is a crime against humanity and a final conclusion is given.

ENVIRONMENTAL HUMAN RIGHTS PROTECTION VS. ECONOMIC DEVELOPMENT IN INDONESIA: THE LEGAL PROBLEM

During the early years of Suharto's administration of New Order (*Orde Baru*) (1967-1972), in order to stimulate economic growth, in 1967, Suharto's administration opened its doors to foreign and domestic investment and several investment laws were enacted afterward.⁹ The peak of national economic development began with *Repelita IV* (1984-1989), known as the era of industrialization where economic growth acceleration would only be attained if supported by sustainable industrial development. This program would have continued until its "take-off" era in *Repelita VI* (1994-1999). However it could not be realized due to the economic crisis which in turn became a political crisis that finally led to the fall of Suharto's regime in 1998.

Under the reformation government, the National Development Program (PROPENAS/Program Pembangunan Nasional), a five year development program which is similar with that of *Repelita/Rencana Pembangunan Lima Tahun* (during Suharto time) was introduced and implemented into the "Yearly Development Plan" (REPETA/*Rencana Pembangunan Tahunan*). At the regional level, the related governments have to formulate a five year development program namely "Strategic Plan of Development" (RESTRA/*Rencana Strategi*) to implement PROPENAS. Notwithstanding, each provincial and district governments in Indonesia have different development priorities based on their RESTRA.

In general, there are five priority areas of development formulated in the PROPENAS,¹⁰ but there is no room for green development as the foundation for good governance includes political stability, the rule of law, control of corruption and accountability.¹¹ Issues related to environmental management and natural resources are given priority since local governments are instructed to increase their local revenues. This kind of development reflected the situation of Indonesia during the early years Suharto's administration. As a result, air, water, land pollution, forest fire, and deforestation resulted in environmental problems generating social unrest and led to conflicts in society. There have been many community-led environmental disputes relating to industries brought to District Courts but less than

one percent of environmental crimes in Indonesia end in punishment.¹² However the number increased to 1.33% during the enactment of The EMA 1997 No. 23. Meanwhile in September 2011, of the 33 cases of environmental-related crimes, 21 cases were declared “free from the charges,” 4 cases ended in jail sentences and in eight cases the perpetrators were placed under probation.¹³ It was reported that in 2011, after the promulgation of The EMA 2009 No. 32, the Indonesian Ministry for Environment handled 171 public complaints; 42 cases were verified by the Ministry Office for Environment, 129 complaints were delegated to the authorized instances who were in charge of those environmental matters, 20 complaints where the responsible owners were given administrative sanctions, 14 complaints were solved by alternative disputes resolution and 8 complaints were followed up with criminal charges (4.67%).¹⁴

In addition, in the anticipation of various kinds of environmental crimes the Ministry for Environment in Jakarta has improved institutional capacity building through an MoU with the Indonesian Police (*Kepolisian RI*) and the Indonesian Public Prosecutors (*Kejaksaan Negeri RI*) on 26th July 2011. Then, on 5th September 2011 a MoU was signed between the Court of Certified Environmental Judges and Environmental Investigators, and the Indonesian Supreme Court. Ratification and adoption of various international conventions and declaration such as the Basel Convention,¹⁵ The United Nations Convention on Biological Diversity,

the Stockholm Declaration,¹⁶ Rotterdam Convention and Nagoya Protocol¹⁷ were conducted to strengthen the protection and environmental management regulations. In addition, the General Guideline on The Handling of Transnational Conflicts was drafted to assist the regional governments in handling transnational conflicts.¹⁸

There is a dilemmatic environmental problem in Indonesia regarding the uneven development program which only focuses on the inner lands of Java, Madura, Bali and Lombok. Ironically, poverty is concentrated in Java, the most populated island (two-thirds of the Indonesian population is centralized in the inner islands of Java, Madura, Bali and Lombok).¹⁹ The interrelated problems abbreviated as “4Ps” for Population, Poverty, Pollution and Policy are factors that generate environmental problems.²⁰ Dense population generates poverty. Poverty generates pollution. Population, poverty and pollution generate policy. Policies also create problems for the environment. Environmental problems relate to economic, politics, social and culture. While law and its supplemental instruments will only be effective if supported by funding and good institutional framework, its enforcement can give rise to problems once implemented in society. Environmental Management Acts (EMAs) cannot fully be implemented as a number of provisions need further implementing regulations and subsidiary legislations. Consequently the EMA cannot thoroughly solve environmental matters. The second factor affecting law enforcement is law enforcers, for example police,

prosecutors, judges and civil service police (*Polisi Pamongpraja*), who are not able to work properly and professionally due to lack of facilities when they are on duty and small salaries.²¹ Additionally, the human resource in law enforcement is not compatible to the vast area of Indonesia and the last factor is the legal culture of the society which sometimes is contradictory to the objective of the law, for example: bribery, corruption, and carrying knives etc and so forth. In short, the entire situation above affects the process of environmental conflict resolution.

VOLCANO MUDFLOW IN SIDOARJO EAST JAVA INDONESIA: IS IT A CORPORATE CRIME?

According to the South Jakarta District Court,²² the volcano mudflow in Sidoarjo East Java is a natural disaster and not an unlawful act (*perbuatan melawan hukum*) of PT. Lapindo's staff during the drilling process under Article 1365 Indonesian Civil Code. The geologists' statements during the proceedings were used as strong evidence for the Judge's verdict. Based on the Presidential Decree No. 14 of 2007 and Presidential Decree No. 48 of 2008 all the damaged infrastructures, railways, telephone lines, power lines, gas pipe lines, school buildings, community health centres (*puskesmas*) were to be-constructed and financed by the state budget (*Anggaran Perbelanjaan Negara/APBN*). The cost for reconstructing the infrastructure is more expensive than paying compensation to the victims. The Court also ordered PT. Lapindo, based on humanity reasons, to

pay compensation for submerged properties within the well-drilling area. The damage outside the drilling area was not under the responsibility of PT. Lapindo but the Government of Indonesia.²³

Many²⁴ argue that the volcano mudflow which emanated in 2006 was due to PT. Lapindo's failure during the drilling process and should be regarded as a corporate crime as regulated under Article 46 of The EMA 1997 No. 23 on Environmental Management²⁵ which stipulates:²⁶

1. If the offense referred to in this chapter is conducted by or on behalf of the corporation, company, association, foundation or other organization, criminal charges are made and criminal sanctions and procedural measures referred to in Article 47 shall both be imposed against the legal entity, company, association, foundation or other organizations concerned and to those who gave orders to commit criminal acts or the one who acts as the leader in the act or to both of them.
2. If the offense referred to in this Chapter, is conducted by or on behalf of the corporation, company, association, foundation or other organizations, and performed by people, either in employment or other relationships, which act within the legal entity, company, association, foundation or other organization, criminal charges are made and criminal sanctions imposed on those who give orders or act as a leader regardless if they are the people,

or the employees who committed the crime individually or collectively.

3. If charges are made against a legal entity, company, union or other organization, calls for court summons and the call letters were delivered to the address of the board in their residence, or where the board does their daily work.

The weakness in Walhi's claim with regard to the element of fault attached to Article 1365 of the Indonesian Civil Code for environmental compensation odds with Article 46 of the EMA 1997. Article 1365 of the Civil Code is a popular article which regulates the unlawful acts (*perbuatan melawan hukum*) where due to one's fault others are harmed and therefore compensation must be given. The fault element of the doer is necessary for the plaintiff to prove in order to claim compensation under Article 1365. If the fault element is used in claims relating to environmental pollution it would be very difficult to be proven since pollution and environmental degradation do not occur immediately but can only be gradually seen in the future. Besides the extent of the pollution is also uncertain. There are a number of parameters and factors surrounding the occurrence of such pollution that depletes environmental quality. For example food supply, climate, hatch date, body size, reproductive output and so forth as in the studies conducted by Cooch, Lank, Rockwell and Cooke,²⁷ and William, Cooch, Jefferies and Cooke.²⁸ One case of pollution will be able to be a reference for

another pollution case, for example, the *Buyat* case, North Sulawesi, Indonesia. The marine environment of a bay was found to be polluted by mercury eight years later, in 2004, after the first dumping of mine waste activities of the Newmont Corporation in 1996.²⁹ Whilst in the *Way Seputi* River case in Lampung, southern part of South Sumatra, the quality of the river was polluted in less than a year.³⁰ In the case of Sidoarjo, the victims were mostly peasants who did not have resources, like money, power and knowledge. If they were required to prove that their economic loss was due to the fault arising from the failure of PT. Lapindo, this would put them in a quandary.

Further development understanding of an unlawful act is not only contrary to law and the rights of other parties but also may include any act contrary to appropriateness that must be considered in the association of the community in conjunction with a personal or property of others.³¹ This principle is identified as a 'no liability without fault,' a principle which was popular and dominated the law of compensation in the common law up to the 19 century.³² In the mid 19 century, however, the principle above was not regarded as the sole principle applied in compensation matters. Rabin said that "the concept of negligence as a basis for determining liability in cases of inadvertent harm was used to pre-existing notions of moral blameworthiness underlying liability for international harms to create a comprehensive theory of liability based on fault."³³ There is an erosion of fault from the victim to the doer or from principles of

'no liability without fault' to 'liability based on fault'. This has evolved a new principle of compensation which latter on became popular with 'strict liability' which is an appropriate principle used in environmental matters, such as pollution and environmental degradation.³⁴ The strict liability principle there-fore reincarnates in the Indonesian Environmental Management Act (EMA), for example Article 20 of The EMA 1982,³⁵ Article 35 of The EMA 1997 No. 23,³⁶ and Article 88 of The EMA 2009 No. 32.³⁷

The shifting of burden of fault from the victim to the doer will lighten the people's encumbrance when the cases are brought to Court.³⁸ Since there is no case to which the Indonesian Judges have referred to strict liability as regulated in the EMA, therefore the reference to the US Courts where strict liability principle has been used in environmental-related cases such as *Atlas Chemical Industries Inc. v. Anderson*,³⁹ *Phillips Petroleum Co. v. Hardae*,⁴⁰ *Burn v. Lamb*,⁴¹ and *Biakanja v. Irving*.⁴² In England this principle was applied in *Ryland v. Fletcher* case (1887). In the renowned case of *Ryland v. Fletcher* (1887) the court decided that a person who brings dangerous substances onto his property and allows them to escape to adjoining land resulting in damage there will be held strictly liable. The defendant was thus liable for damage caused by the escape of water from a reservoir on his land.⁴³

In relation to Article 1365 of the Civil Code proved to be the stumbling block in the case of the oil spill caused by the Super Heavy Tanker Showa Maru in the Malacca

Straits in 1975 in a suit for environmental compensation. Indonesia as the victim had to prove that the polluted marine and ecosystem of the eastern coast of Sumatra was due to the fault of Showa Maru's captain. Mean-while, in the case of Sidoarjo volcano mudflow, PT. Lapindo as the plaintiff had submitted expert geologists' statements to defend itself, whilst Walhi provided statements from environmental law experts who referred to corporate crimes under Article 46 of the EMA 1997, newspaper clippings and news reported on TV that the judge considered as informal legal evidence according to the Indonesian Penal Proceeding Code.⁴⁴ The situation was made worse when two tests on the mud characteristic conducted by different labs showed different result. The first test lab (belonging to the Government) showed that the mud was non-toxic while the second test lab (a public university lab) illustrated that the mud was toxic. In this context, there is a "Blackstone ratio" which is 10:1 derived from idiomatic expression in criminal law introduced by William Blackstone in his Commentaries on the Law of England published in 1760s "better that ten guilty persons escape than that one innocent suffers."⁴⁵ Under this condition, the judge freed the alleged perpetrator although many research findings claimed that it was not a natural disaster but failure or negligence committed by PT. Lapindo. Nevertheless, PT. Lapindo was still held responsible for restoring the environment in the affected areas.

Prosecuting a provision on corporate environmental crime successfully is difficult. Canada,⁴⁶ the United States,⁴⁷ The Netherlands,⁴⁸ France,⁴⁹ and Germany are countries that do not have environmental crime provisions in their environmental laws. In Japan environmental crime⁵⁰ has never been declared by the courts because the prosecutors are unable to prove the presence of intention, an element essential in criminal law. In China, criminal sanction for environmental crimes is regulated by the 1979 Law on Environmental Protection, where section 32 declares that “polluters are liable to administrative, economic or criminal sanctions⁵¹ but there is no information whether those regulations are applicable in reality for corporate environmental crime.

The problem with corporate environmental crime is the focus on intention in connection to environmental pollution, in addition to the element of deterrence and the effectiveness of formal legal sanctions in limiting illegal corporate acts. Meanwhile, scholars have not provided a solution as to how intention can be proven or how deterrence can be more effective. Peternoster and Simpson⁵² stated that “corporate crime consists of illegal acts by corporations or their representatives that are undertaken to further the goals of the organization and violate civil, administrative and criminal statutes and encompasses a variety of behaviour.” Some of the acts categorized as corporate crimes are bribery, fraud, price-fixing, toxic dumping, insider trading, and crimes against employees, consumers, suppliers, buyers and competitors.⁵³ Suing corporate environmental violation using a

traditional deterrence model as applied to corporate crime has not been effective since in many environmental cases involving big corporations are not severe enough to affect the corporation’s behaviour.

Under the Indonesian legal system, the issue of corporate crime is not only regulated under the EMA but also the anti-corruption⁵⁴ and money laundering laws.⁵⁵ However, in reality the provisions that deal with corporate responsibility under the EMA⁵⁶ are not strong and respectable enough to bring the offenders to prison as compared to the other two laws mentioned above.⁵⁷ Meanwhile there are also other environmental violations that have never been brought to court, such as leak of a three-ton tank of monosodium glutamate of “Ajinomoto” which created a tremendous impact on the environment in 1998. In this case there was neither law enforcement nor an environmental recovery. The entire group of villagers was forcibly removed and their land compulsorily purchased. Then, in 2001 there was an oil and gas leak from the plant operated by Devon Canada and Petrochina in Suko district, Tuban East Java. The hydro sulphide content was quite high, resulting in the hospitalisation of 26 farmers. The incident sparked rage among the village community who went to investigate resulting in 14 people being shot by the Bojonegoro police. In 2003, an explosion at Petrowidada, an oil and gas company, razed several buildings and polluted a nearby river. Only two were sentenced, a security guard (*satpam*) and a technical officer. Similarly with PT. Lapindo, in 2006, the displacement of 50,000 people was seen as

a minor accident and not a corporate crime.⁵⁸

Many factors hamper law enforcement in Indonesia. As a developing country Indonesia has less stringent environmental standards than industrialized countries.⁵⁹ It is more profitable for investors since Indonesia does not require compliance to strict environmental standards. Investment regulations which provide incentives like tax holiday or grace period, BOT (Build, Operate and Transfer) and other facilities etc., are open for negotiation and would certainly attract many investors to Indonesia. Economic calculations can easily compute the financial rewards of non-compliance to current environmental laws and the administrators can easily be bribed to smoothen the bureaucratic chain and facilitate escape from penalties. The supremacy of law will seriously be in jeopardy if the administrators continued to treat industry as paramount and environmental degradation and pollution as the price the locals have to pay.⁶⁰

IS CORPORATE ENVIRONMENTAL CRIME A CRIME AGAINST HUMANITY?

Discussing environmental crimes from the human rights' perspective is something new in Indonesia, although the notion of incorporating environmental rights into human rights values has been acknowledged in The EMA 2009 No. 32 and The Law 1999 No. 39 on Human Rights. Political manifestation of the international community toward the human environment and development as mandated by The

Stockholm Declaration 1972 on Human Environment⁶¹ and The Rio Declaration on Environment and Development⁶² has been implemented into regional⁶³ and national laws. Among the 55 countries,⁶⁴ Indonesia has adopted environmental rights into her Environmental and Human Rights Laws⁶⁵ and also in the Second Amendment of The Constitution 1945. Thus, the notion of a good and healthy environment is constitutional rights and legal rights, respectively, which the State has prioritised to secure and protect their citizens. Placing environmental human rights values into a national constitution is a strong indicator of national *opiniojuris* and represents the highest level of national law operating as a *lexsuprema*.⁶⁶

As stated above, in Indonesia the right to a good and healthy environment has been guaranteed under the EMA 1982 No. 4 and EMA 1997 No. 23. However, this legal right has no further explanation either in the text or in the elucidation of the provision. It was just recently after the Reformation in 1998 that environmental rights was integrated into human rights law, such as point (a) of the Consideration of The EMA 2009 No. 32 which was implemented into Article 3 where the objectives of environmental management is, *inter alia*, to guarantee the fulfilment of the protection of rights towards the environment as a part of human rights. The environmental human rights in Article 9(3) of The Law No. 39 of 1999 on Human Rights⁶⁷ stated that "the right to a good and health environment is part of human rights, especially the right to life". Thus, in legal terms, a violation

to environmental rights is also a violation to human rights⁶⁸ and the offender may taken to Human Rights Court. Regrettably, environmental human rights violation does not come within the purview of the Human Rights Court as it only prosecutes gross human rights violation including genocide and crime against humanity.⁶⁹ This situation is similar to the European Human Rights Court prior to The Stockholm Declaration 1972. Many environmental cases submitted to this Court were rejected.⁷⁰ After the Stockholm Declaration, the Commission realized that there was correlation between environmental rights violation with human rights, especially the right to life.⁷¹ Human beings cannot live in a polluted environment and human survival depends on the quality of the environment.⁷²

Integrating environmental rights into human rights values is important, as Kesentini⁷³ declares in her report that "... human rights and the environment... [are] equally important to establish the legal framework for pursuing what have become the essential demands of this century, in order to take up the legitimate concerns of our generation, to preserve the interests of future generations and mutually to agree upon the components of a right to a healthy and flourishing environment." Mohammed Sahnoun⁷⁴ has acknowledged in his report about the linkage between human rights matters and the environment by fostering global awareness of complex, serious and multidimensional nature of environmental problems and attention is being focused more and more on environmental deterioration.

Other scholars, like Hill, Wolfson and Targ⁷⁵ and Appattu⁷⁶ opined that "marrying" environmental value to human rights is a slow emergence of the idea that humans have a basic right to a healthy environment. It will achieve a higher degree of relevance because the environment is everyone's backyard.⁷⁷ No one can escape the human consequence of environmental degradation and human society cannot function independently of the natural environment.⁷⁸ Other scholars, for instance Ruppel⁷⁹ reviewed environmental problems from the angle of the third-generation of human rights or solidarity rights and there is a close relationship between human rights violation to the impairment of environment.⁸⁰ Giorgetta⁸¹ claimed that sustainable development could not be realized if the implementation of such development programs always impairs environmental rights. Chen and Dong⁸² discussed environmental rights from the perspective of development without impairing the environment called "eco-development" and concluded that environmental rights might become a safeguard and defend human rights and ultimately facilitate producing better conditions of life on earth by stretching and expanding the theory of traditional human rights.

A dilemmatic problem in the implementation of environmental human rights into the national law of developing countries is frequently the question of sacrificing the environment and human rights to overcome economic backwardness. The international community has responded

this trade-off with the third generation of human rightst which includes amongst others a healthy environment and right to development.⁸³ Regrettably, the developing countries respond to this by paying less attention to environmental standards than industrialized countries. Strict environmental laws are not often enforced in developing countries like Mexico, Brazil, the Philippines and Indonesia who have a long-standing reputation for being 'soft' in regulating environmental issues.⁸⁴ Many⁸⁵ argue that the real problem originates in the lack of motivation of administrators to enforce environmental law. In reality, in Indonesia many issues are problematic and interrelated; beginning from the ambiguous legal text formulated in the statutes and its multi-interpretation, lax attitude of legal enforcers, lack of apparatuses for law enforcement to the legal culture of the society.⁸⁶ They all form a tangled thread that need to be cut for a way out.

CONCLUSION

The environmental criminal provisions stipulated in The Indonesian Environmental Management Act (EMAs) cannot fully be implemented to punish the corporate whose activities have created pollution and environmental degradation. Many factors hamper law enforcement. As a developing country Indonesia has less stringent environmental standards than industrialized countries. Consequently, it is more profitable business making since administrators are not often forced to comply with the strict environmental standards.

The supremacy of law is in a quandary if the administrators continue to treat the industry as paramount and environmental degradation and pollution as the price the people of Indonesia have to pay.

Corporate environmental crimes should be viewed as human rights violation under the right to life. By extending the purview of the Human Rights Court to include environmental pollution and environmental degradation as an element of human rights, not only can this matter be addressed, it can also inculcate a healthier corporate attitude towards the environment and the citizens of earth.

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- The 1980 Constitution of Chile.
- The 1988 Constitution of the Federative Republic of Brazil.
- The 1989 San Salvador Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. The Protocol came into force in 1999 (P. R. Gandhi, 2006 *Blackstone's Statutes: International Human Rights Documents*, Oxford University Press).
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ENDNOTES

- ¹ "PT" is the abbreviation of *Perseroan Terbatas* is legal person under Indonesian law which is equivalent to *Sdn.Bhd* in Malaysian legal system.
- ² There is no precise number as to how much land had been flooded but estimation shows from approximately 360 hectares to approximately 600 hectares. The mudflow is still continuing, and in 2008 at least 10 km square kilometers had been covered by the mud (See: Radar Sidoarjo on <http://mudflow-sidoarjo.110mb.com/index.htm>, March 12 2007in: Friends of the Earth International, "A Background paper prepared for Friends of the Earth International and Friends of the Earth Europe", June 15, 2007.
- ³ Mud Volcano In Java May Continue To Erupt For Months And Possibly Years. (2007)*Science Daily*, Jan 24.In a background paper prepared for Friends of the Earth International and Friends of the Earth

Europe, *Friends of the Earth International*, June 15, 2007.

⁴Indra Harsaputra, "Govt weighs options for battling the sludge," *The Jakarta Post*, May 29 2007. In a background paper prepared for Friends of the Earth International and Friends of the Earth Europe, *Friends of the Earth International*, June 15, 2007.

⁵ANTV News, June 8, 2006; *The Surabaya Pagi Post* (June 7, 2006); *The Kompas Post* (June 8, 2006); Geo-science Laboratory in *Kompas* June 8, 2006; *Opini Metropolis Jawa Pos* (2 June, 2006); *Kepala Pusat Studi Bencana, Kompas* (8 June, 2006); *Surya Post* (10 June 2006).

⁶The last remedy was to build some sort of containment "basin", looks like a "pond" where the mud expected to flow. At first this effort seems fruitful success. Because of the volume of mud getting increased everyday, then the container leaked especially during the raining season (*The Jakarta Post*, March 02 2007, March 19, 2007, <http://mudflow-sidoarjo>).

⁷www.walhi.or.id

⁸No. 284/Pdt.G/2007/PN.Jak. Sel.

⁹Those investment laws are: The Law 1967 No. 1 on Foreign Investment (State Gazette of the State of The Republic of Indonesia 1967 No. 1, Additional to State Gazette No. 2828); The 1970 No. 11 on The Revision and Additional to The Law 1967 No. 1 on Foreign Investment (State Gazette of The State of The Republic of Indonesia 1970 No. 46, Additional to State Gazette No. 2943) and The Law No. 6 on Domestic Investment (State Gazette of The State of The Republic of Indonesia 1968 No. 33, Additional to The State Gazette No. 2853; The Law 1970 No. 12 on The Revision and Additional to The Law 1968 No. 6 on Domestic Investment (State Gazette of The State of The Republic of Indonesia 1970 No. 47, Additional to State Gazette of the State of the Republic of Indonesia No. 2944). The present investment law is The Law 2007 No. 27 on Investment (The State Gazette of The State of the

Republic of Indonesia year 2007 No. 67).

¹⁰Those five priorities development are: to develop a more democratic political system in the context of Indonesia's unitary state of; to realize the supremacy of law and clean government; to accelerate economic recovery and strengthen the foundation of sustainable development and justice; to develop people's welfare and cultural resilience, and to improve regional development.

¹¹The concept of good governance introduced by the donor countries in their aids for recipient country in 1980-1990s and is difficult to implement since high levels of poverty and weak governance making selectivity of development program priority difficult to implement (Ved P. Nanda, "The "Good Governance" Concept Revisited", University of Denver Sturm College of Law (<http://ann.sagepub.com/content/603/1/269.short>) (29 June 2012).

¹²"Environmental Crimes Go Unpunished in Biodiverse Countries," Report Says, (2004) 42 (244) *Clean Water Rep.* In Tracy M. Schmidt, "Transnational Corporate Responsibility for International Environmental and Human Rights Violations: Will the United Nations "Norms" Provide the Required Means?" 36 *Cal. W. Int'l L.J.* 217.

¹³National Coordination Meeting on Environmental Law Enforcement 2011 arranged at Mercure Hotel 3 Oct. 2011/Rakornas Penegakan Hukum Lingkungan 2011 (29 June 2012)

¹⁴National Coordination Meeting on Environmental Law Enforcement 2011 arranged at Mercure Hotel 3 Oct. 2011/Rakornas Penegakan Hukum Lingkungan 2011 (29 June 2012).

¹⁵Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal. (Available at www.basel.int/.../Basel%20Convention/.../BaselConvention)

¹⁶The United Nations Declaration on Human Environment 1972 (A/CONF. 48/14/Rev.1).

- ¹⁷ The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising From Their Utilization to the Convention on Biological Diversity. (Available at : www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf)
- ¹⁸ <http://www.new.menlh.go.id> (Retrieved on 29 June 2012)
- ¹⁹ "The number and the population distribution." In <http://sp2010.bps.go.id/>.
- ²⁰ Muna djat Danusaputro, (1981). *Hukum Lingkungan Buku I: UMUM*, Penerbit Binacipta Bandung.
- ²¹ Soerjono Soekamto., (1983) *Faktor-Faktor Yang Mempengaruhi Penegakan Hukum*, Penerbit CV. Rajawali, Jakarta.
- ²² The verdict No. 294/Pdt.G/2007/PN.Jak. Sel. (27th December, 2007).
- ²³ The Appeal Court accepted the appeal reported in No. 383/PDT/2008/PT.DKT and this strengthened the verdict made by the District Court of South Jakarta No. 284/Pdt.G/2007/PN.Jak.Sel, dated 27 December 2007. This means that the volcano mudflow in Sidoarjo was regarded as a natural disaster. There are two more legal recourse left for Walhi may use nowie. submitting the case to the Supreme Court and the legal review (Peninjauan Kembali/PK) of the Court's verdict.
- ²⁴ ANTV News, June 8, 2006; Executive Director of WALHI East Java as quoted by the Morning Surabaya Post, June 7, 2006; The Kompas Daily, June 8, 2006; The Opini Metropolis JawaPos, June 2, 2006; Kepala Pusat Studi Bencana, ITS, June 8, 2006; Surya Post, June 10, 2006; Ikatan Ahli Geologi Indonesia).
- ²⁵ The Volcano mudflow occurred during the application of The EMA 1997 No. 23 on Environmental Management before the promulgation of The EMA 2009 No. 32 on the Protection and the Management of the Environment.
- ²⁶ Uncertified translation.
- ²⁷ E. G. Cooch, D. B. Lank, R. F. Rockwell and F. Cooke, (1991). Long-Term Decline in Body Size in a Snow Goose Population: Evidence of environmental degradation?. *Journal of Animal Ecology*, 60, 483-496.
- ²⁸ T. D. William, E. G. Cooch, R.L. Jefferies, and F. Cooke, (1993). Environmental Degradation, food limitation, and reproductive output: Juvenile survival in lesser snow geese. *Journal of Animal Ecology*, 62, 766-777.
- ²⁹ The Buyat bay is small bay located on the south coast of Minahasa Peninsula island of Indonesia. PT. Newmont *Minahasa Raya*, the subsidiary company of Newmont Mining Corporation had used the bay as the tailing (mine waste) dumping ground for its gold mining activities from 1996. In 2004 local people in the area complained for several unusual health problems which further suspected Newmont's for breaching the mining waste regulation to have contaminated the area with hazardous materials.
- ³⁰ Walhi Lampung, 22th August 2000.
- ³¹ Komar Kantaatmadja, *Gantirugi Internasional Pencemaran Minyak di Laut*, Alumni Publisher, Bandung 1981, p. 58.
- ³² Komar Kantaatmadja, Alumni Publisher, Bandung 1981, p. 58.
- ³³ Robert L. Rabin, (1979) *Perspective on Tort Law*, Boston, p. 1.
- ³⁴ Komar Kantaatmadja, Alumni Publisher, 1982., 57-67.
- ³⁵ The State Gazette of the Republic of Indonesia 1982 No. 12.
- ³⁶ The State Gazette of the Republic of Indonesia 1997 No. 68, State Gazettes Additional No. 3699.
- ³⁷ The State Gazette of the Republic of Indonesia 2009 No. 140.

- ³⁸ Komar Kantaatmadja, Alumni Publisher, Bandung 1981.
- ³⁹ 31 Torts and Ins. L.J. 73-88 (1995)
- ⁴⁰ *Textile technology digest*, vol. 28., 194.
- ⁴¹ Edmund Hatch Bennett, Russell Gray, Henry Walton Swift, Franklin Fiske Heard, Francis Lewis Wellman, Massachusetts. Supreme Judicial Court, *Massachusetts digest: a digest of the reported decisions of the Supreme Judicial Court of the Commonwealth of Massachusetts from 1804 to 1879*, with references to earlier cases, Volume 1: 48.
- ⁴² Charles Szypzak, 211 *Understanding Law for Public Administration*, Jones and Bartlett Publisher, 182.
- ⁴³ Many American scholars saw the decision in *Rylands* as a poor one. It was not considered as trespass, since the damage is not direct, and it was not a nuisance either, since there was no continuous action (Bohlen, Francis H., "The Rule in *Rylands v. Fletcher*. Part I". (1911) 59 (5) *University of Pennsylvania Law Review and American Law Register*.
- ⁴⁴ Art 184 of Penal Proceeding Code (*Kitab Undang-Undang Hukum Acara Pidana*): Legal evidence may consist of statements of witnesses, expert testimony, letters, instructions and a description of the defendant. In the elucidation of Art 184 no information whether news paper clippings, TV news, internet sources may regarded as legal evidence under the Indonesian Penal Proceeding Code.
- ⁴⁵ 146 *University of Pennsylvania Law Review* 173 (1997)
- ⁴⁶ Canadian Environmental Protection Act (CEPA)
- ⁴⁷ National Environmental Protection Act (NEPA)
- ⁴⁸ Environmental Management Act, Text of the Environmental Management Act dated 1 May 2004 (Legislation Netherlands in: www.lexadin.nl).
- ⁴⁹ Environmental Code (Act No. 2002-276 of 27 February 2002) (www.legifrance.gouv.fr).
- ⁵⁰ The 1970 Law No. 142 on the Punishment of Crimes related to the Environmental Pollution which Adversely Affect the Health of Persons.
- ⁵¹ V. Cheng Yang, (1995) 44 "Punishing for Environmental Protection?-Enforcement Issues in China", *Int'l & Comp. L.Q.*, 671-682
- ⁵² Raymond Peternoster and Sally S. Simpson, "A Rational Choice Theory of Corporate Crime" in: Ronald V. Clarke and Marcus Felson (Eds), *Routine Activity and Rational Choice: Advance in Criminology Theory*, 5, 37.
- ⁵³ Raymond Peternoster and Sally S. Simpson. A Rational Choice Theory of Corporate Crime. In Ronald V. Clarke and Marcus Felson (Eds.), 37.
- ⁵⁴ The Law 1999 No. 31 on the Corruption Eradication amended by The Law 2001 No. 20 on The Revision of Law No. 31 of 1999 on the Corruption Eradication (The State Gazette of the Republic of Indonesia 2001 No. 134).
- ⁵⁵ The Law 210 No. 8 on The Prevention of and Combating Crimes for Money Laundry (The State Gazette of the Republic of Indonesia 2010 No. 122).
- ⁵⁶ For instance: Art 22 (The EMA 1982 No. 4); Art 45 and Art 46 (The EMA 1997 No. 23) and Art 97 (The EMA 2009 No. 32).
- ⁵⁷ The Law 1999 No. 31 on the Corruption Eradication amended by The Law 2001 No. 20 on The Revision of Law No. 31 of 1999 on the Corruption Eradication (The State Gazette of the Republic of Indonesia 2001 No. 134)., and The Law 210 No. 8 on The Prevention of and Combating Crimes for Money Laundry (The State Gazette of the Republic of Indonesia 2010 No. 122).
- ⁵⁸ Walhi working paper on "the PT. Lapindo Berantas the volcanic hot mud flow in Sidoarjo: A legal sides of corporate crimes."
- ⁵⁹ Pushkar Maitra, Environmental Regulation, International Trade, and Transboundary Pollution, *International Economic, Finance and Trade*, Vol II (available at: www.eolss.net/Sample-Chapters/C13/E1-23-06-03.pdf)

- ⁶⁰ PushkarMaitra, Environmental Regulation, International Trade, and Transboundary Pollution, *International Economic, Finance and Trade*, Vol II (available at: www.colss.net/Sample-Chapters/C13/E1-23-06-03.pdf)
- ⁶¹ A/CONF. 48/14/Rev. 1 (1972)
- ⁶² A/CONF.151/26 (Vol. I)
- ⁶³ Art. 16 (1) African Charter of Human and People's Rights adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986) (www.africa-union.org; Art. 11 of the 1989 San Salvador Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights; The Protocol came into force in 1999 (P.R. Gandhi, *Blackstone's Statues: International Human Rights Documents*, Oxford University Press, 2006).
- ⁶⁴ Art. 46 (Environment)(Belarusian Constitution, Adopted 1994) (); Chapter VI: Environment. Art. 225 (The 1988 Constitution of the Federative Republic of Brazil); Art.1 – TheConstitutionalisation of the French Charter for the Environment: Constitutional and Environmental Implications”, (2008) 10 *Envtl.L. Rev.* 9; Art 37 (3) The Georgia Constitution, Adopted on 24 August 1995, and last amendment 27.12.06 states in Article 37 (3) (<http://www.parliament.ge>); Art 110 (b) of The Norwegian Constitution (<http://www.stortinget.no>); Art 72 (1) (2) (Healthy Living Environment) of The Slovenian Constitution adopted on 23 Dec. 1991 and amended on 14 July 1997, 25 July 2000, 7 March 2003, 15 June 2004, 20 June 2006. (); Sec 41.-(The 1994 Argentina Constitution) ([http://www.hrcr.org/chart/annotations &references/Argentina.html](http://www.hrcr.org/chart/annotations&references/Argentina.html)); Art 19 Para. 8.-(1980 Constitution of Chile); Art 50.Para. 2(Constitution of The Republic of Costa Rica, as amended by Article 1°, Law No. 7412, June 3, 1994.)(http://www.costaricalaw.com/constitutional_law/constitution_en.php); Art 27(Constitution of the Republic of Cuba, 1992) (http://www.cubanet.org/ref/dis/const_92_e.htm); Art 14. (Constitution of the Republic of Ecuador()); Art 69 (Constitution of the Republic of El Salvador, 1983(as Amended to 2003) ()); Art 145(Constitution of the Republic of Honduras 1982 (Updated through the Decree 36 of May 4 2005) ()); Art. 60 (Nicaraguan Constitution of January 9 1987. (Retrieved: <http://janda.org/politxts/Major%20Democratic%20Documents/nicaragua.htm>) and Art. 7 (1) (Paraguay Constitution, adopted 20 June 1992) (http://www.servat.unibe.ch/icl/pa00000_.html)
- ⁶⁵ Art. 65 (1) of the 2009 EMA No. 32 the State Gazette of the Republic of Indonesia 2009 No. 140.
- ⁶⁶ Ole W. Pedersen, European Environmental Human Rights and Environmental Rights: A Long Time Coming? (2008) 21 *Geo.Int'l Env'tl. L.Rev.* 73.
- ⁶⁷ State Gazette 1999 No.165.
- ⁶⁸ S. Giorgetta, “The right to a healthy environment, human rights and sustainable development” (2002) 2 *International Environmental Agreements: Politics, Law and Economic.* 173–194.
- ⁶⁹ Art 7 (The Law 2000 No. 26) classified that gross breaches of human rights may include genocide crime and crime against humanity. Furthermore Art 9 explains the criterion of genocide crime and Art 9 is about the criterion of crime against humanity (State Gazette 2000 No. 208).
- ⁷⁰ Daniel García San José, 2005 *Environmental Protection and The European Convention on Human Rights*, Council of Europe Publishing, 7.
- ⁷¹ Daniel García San José, 7.
- ⁷² S. Sensi, ‘Human Rights and the Environment: The Perspective of the Human Rights Bodies.’ In UN Environment Programme, *Human Rights and the Environment*, Proceedings of a GenevaEnvironmental Network Roundtable (UNEP, 2004), at 6, (available at(<http://www.environmenthouse.ch/docspublications/reports/roundtables/Human%20Rights%20Env%20Report.Pdf>).

- ⁷³ See: FatmaZohraKesetini's report entitle "Review of Further Developments in the Fields of Human Rights and the Environment" submitted to the Forty-sixth session of the Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities (between year 1992 and 2001).
- ⁷⁴ Mohammed Sahnoun, «*Environnement et développement*», *Revue algérienne des relations internationales*, No. 8, 1987, OPU, Algies in: Mrs. Fatma Zohra Kesentini Report in E/CN.4/Sub.2/1994/9 6 July 1994.
- ⁷⁵ B. Hill, S. Wolfson, & N. Targ, Human Rights and the Environment: A Synopsis and Some Predictions, (2004) 16 *Geo. Int'l Envtl. L. Rev.* 359, 399-400.
- ⁷⁶ SumuduAtapattu, "The Right to a Healthy Life or the Right to Die Polluted?The Emergence of a Human Rights to a Healthy Environment under International Law, (2002) 16*Tul.Envtl. L. J.* 65, 68.
- ⁷⁷ Neil. A.F. Popovic, "In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment," (1996) 27 *Colum. Human Rights L. Rev.* 487.
- ⁷⁸ Neil. A.F. Popovic, "In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment", 487.
- ⁷⁹ A. Kiss & D. Shelton. 2004. *International environmental law*. Ardsley, NY: TransnationalPublishers, p 12. In: O.C Ruppel, 'Third-generation of human rights and the protection of the environment in Namibia' (<http://scholar.google.com.my/scholar>).
- ⁸⁰ Rights in this category include self-determination, the right to peace, the right to a healthy environment, and the right to inter-generational equity which include the right to development (Oliver C. Ruppel, 'Third-generation of human rights and the protection of the environment in Namibia' (<http://scholar.google.com.my/scholar>)).
- ⁸¹ SuillyGiorgetta, "The right to a healthy environment, human rights and sustainable development" (2002) 2 *International Environmental Agreements: Politics, Law and Economic.*, 173-194.
- ⁸² ChenDemin, and DongZhengai, 'Environmental rights: on the perspective of harmonious development between human beings and nature', Law School of Chongqing University, Chongqing 400044, China (2008) 18 (1) *China Population, Resources and Environment*, pp 189-192.
- ⁸³ The division of human rights generation was proposed by KarelVassak at the International Institute of Human Rights in Strasburg France in 1977. Notwithstanding the "Third Generation of Human rights" remains largely unofficial and covers extremely broad spectrum of rights.
- ⁸⁴ Tracy M. Schmidt, "Transnational Corporate Responsibility for International Environmental and Human Rights Violations: Will the United Nations "Norms" Provide the Required Means?" 36 *Cal. W. Int'l L.J.* 217.
- ⁸⁵ Soekamto Soerjono, *Faktor-Faktor Yang Mempengaruhi Penegakan Hukum*, Penerbit CV. Rajawali, Jakarta, 1983.
- ⁸⁶ SoerjonoSoekamto, (1983) *Faktor-Faktor Yang Mempengaruhi Penegakan Hukum*, Penerbit CV. Rajawali, Jakarta.