The Concept of Recovery on Human Rights Due Diligence by Corporation in Indonesia
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Abstract
Regulation of the National Human Rights Commission Number 001 of 2017 concerning Ratification of the National Action Plan for Business and Human Rights regulates one of them concerning the obligation of companies to carry out human rights due diligence on their business activities. The matter is complexly regulating the guidelines for prevention, handling, resolution and recovery of human rights violations committed by corporations. Especially in recovery, the current judicial and non-judicial mechanisms have not been able to fulfill the rights of the people as victims so it is important to look at the concept of recovery offered by the National Action Plan on Business and Human Rights. This study used normative juridical research that used library data as the main data. The research method used the study of legislation, literature studies and comparisons with other countries. This study wants to discuss two important aspects, namely: First, how does the position of human rights due diligence in national law regarding the scope of corporate responsibility related to its business activities? Second, how is the concept of the implementation of recovery mandated by the National Human Rights Commission Regulation Number 001 of 2017 concerning Ratification of the National Action Plan for Business and Human Rights? In the end, this study aims to look at the position of human rights due diligence in national law regarding the scope of corporate responsibility related to its business activities so that it is known that the implementation of the recovery offered can complement the implementation of the recovery that has existed in Indonesia today.

Keywords: Business and Human Rights, Corporations, Recovery

INTRODUCTION
Indonesia is a country based on Social Justice for the entire Indonesian people (5th Sila of Pancasila) where justice does not only cover the public aspect but also in the private aspects such as in business activities. In Article 74 of Law Number 40 of 2007 on Companies, it is stated that the Company is obliged to carry out corporate responsibility, namely with the aim of improving the quality of life and the environment so that it is not only beneficial for the company but also society in general. The obligation in question must be carried out in accordance with the principles of propriety and fairness (Explanation of Law No 40 of 2007 on Company). One example of this is through the provision of jobs, increasing welfare and environmental maintenance for future
generations (Binoto Nadapdap, Hukum Perseroan Terbatas, (Jakarta: Permata Aksara, 2012), p. 138.). In addition to this mechanism, other forms of accountability can be taken towards the impact of business activities, namely the existence of judicial and non-judicial mechanisms that can be carried out in the civil and criminal domain.

Corporations as entities that have a significant influence in the growth of a country often commit human rights violations in the operationalization of business activities, both in the fields of environment, health, employment, humanity, and other fields. The role and influence of the power of transnational corporations in the world economy cannot be denied. As many as 300 of the world’s largest corporations are estimated to control around a quarter of production assets on Earth. It is recognized that at present the corporation is the biggest offender of human rights because of its ability to control the economy and even politics from the aspect of capital. On the other hand the corporation also has an important role in helping the government meet basic needs such as health, education and communication services, and technology investments (David Kinley, Civilising Globalisation: Human Rights and the Global Economy, Cambridge University Press, New York, 2009, p. 158).

Indonesian Commission for Victims of Violence said that in 2016 there have been 149 human rights violations caused by business activities in Indonesia such as deprivation of community land rights, pollution and environmental destruction and mining exploitation (Ahmad Sofian, Akuntabilitas Pelanggaran HAM Pada Sektor Bisnis, binus.ac.id (accessed April 20, 2019). This results in the obligation to protect human rights not only in the state and individuals but also in the corporation as a business entity. This conception of protection provides the responsibility to respect, protect, and fulfill every right inherent in everyone in any activity, especially business activities.

For this mandate, Indonesia in 2017 through the National Human Rights Commission enacted Regulation of the National Human Rights Commission Number 001 of 2017 on the Ratification of the National Action Plan for Business and Human Rights which generally regulates the necessity for business entities to carry out due diligence human rights. The implementation of human rights due diligence is carried out through the provision of mechanisms for victim complaints and periodic reports to verify the commitment of business entities in respecting human rights (Article 4 paragraph (2) Regulation of the National Human Rights Commission Number 001 of 2017 concerning Ratification of the National Action Plan for Business and Human Rights). In addition, it
also regulates the mechanism of recovery and resolution of disputes between corporations and affected victims (Article 3 paragraph (1) Regulation of the National Human Rights Commission Number 001 of 2017 concerning Ratification of the National Action Plan for Business and Human Rights). The arrangement of this mechanism raises questions about its position in the corporate responsibility system in the social aspects that have an impact on the people known at this time. Another important issue discussed is the concept of recovery in the framework of human rights due diligence compared to the concept of recovery that has existed at this time.

RESEARCH METHOD
This research was conducted using juridical-normative approach method. The normative juridical approach is the problem approach by looking at, examining and interpreting theoretical matters concerning legal principles in the form of conceptions, legislation, views, legal doctrines and related legal systems. This type of approach emphasizes the acquisition of information in the form of legal texts related to the object under study (Abdulkadir Muhammad, *Hukum dan Penelitian Hukum*, (Bandung : Citra aditya bakti, 2004), p.112). This explanatory research aims to describe more clearly and precisely the problems of human rights fulfillment by corporations with several variables such as problems, impacts, and benefits that occur within the community itself (Gaol, 2015). The data used in this research is secondary data obtained through library research by reading, studying literature, legislation, documents related to the issues discussed in this study. The secondary data under study consisted of primary legal materials and secondary legal materials (Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta: Kencana, 2008), p.140.). Primary legal material is a legislation both nationally and internationally while the secondary legal materials are legal materials in the form of publications about the law that the contents explain and analyze the primary legal materials. Books, articles, draft laws, journals, previous research results are used as secondary legal material in this study.

DISCUSSION
1.1 Regulation on Human Rights Due Diligence in International and National Legal Instruments
Human rights due diligence includes a continuous management process that needs to be done carefully, wisely, according to its circumstances (including the sector, operating context, size, and similar factors) to fulfill its responsibility to respect human
The Concept of Human Rights Due Diligence

The Human Rights Due Diligence known in the current national legal system basically comes from international legal instruments initiated by the United Nations. A concrete description of this will be discussed through several sub-chapters as follows:

1.1.1. Responsibility for Human Rights by Corporations in the Implementation of Business Activities

Business and human rights are important discussions today. Corporations which from the beginning are not included in the component of fulfillment and protection of human rights are increasingly highlighted so that in carrying out their business activities the corporation is obliged to respect the principles of human rights (Pemerintah Libatkan Organisasi Masyarakat Sipil Susun Panduan Bisnis dan HAM, https://www.hukumonline.com/herita/baca/lt593cd4689050c/pemerintah-libatkan-organisasi-masyarakat-sipil-susun-panduan-bisnis-dan-ham, accessed April 17, 2019). Basically, business and human rights issues have been started for a long time with various initiatives carried out by various parties by issuing agreements that are expected to be universally recognized. UNGC (United Nation Global Compact); b. OECD Guidelines for Multinational Corporations and Principles of Corporate Governance; c. The World Bank Policy on Indigenous Peoples and Draft Policy on Involuntary Resettlement; d. Amnesty International’s Human Rights Guidelines for Companies; e. The Global Sullivan Principles; f. The Australian Non-Government Organisations’ Principles for the Conduct of Company Operations within the Minerals Industry; and g. The German NGO network’s Principles for the Conduct of Company Operations within the Oil and Gas Industry.

The urgency for the role of corporations to be included in the fulfillment and protection of human rights is based on reports received by the National Human Rights Commission that in the period 2012-2016 human rights violations involving the role of corporations in Indonesia continue to increase over time (Komisi Nasional Hak Asasi Manusia, https://www.komnasham.go.id/index.php/data-pengaduan, accessed April 16, 2019).

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This fact is increasingly strengthened with the aim of corporations merely pursuing profits so that the most important aspect is that people's welfare is often forgotten (Jimly Asshiddiqie, Demokrasi dan Hak Asasi Manusia, mahkamahkonstitusi.go.id, (accessed April 17, 2019), p. 9. Material presented at the general study at the 1st National Conference Corporate Forum for Community Development, Jakarta, December 19, 2005). In this case the corporation can be in two opposite positions. On the one hand, corporations that carry out their business sustainably can be an effective driver in realizing prosperity for developing countries. However, on the other hand, corporations can also be easily entangled in discriminatory practices, destroyers and exploiters in weak groups (Arief Dwi Meiwoanto, Kepatuhan HAM Tentukan Reputasi Korporasi, https://jakarta.kemenkumham.go.id/berita-hukum-dan-ham/352-kepatuhan-ham-tentukan-reputasi-korporasi, (accessed April 17, 2019). In line with this, the UN Human Rights Council agreed for the first time that transnational corporations and other business worlds were third parties that could threaten the fulfillment of individual and community human rights (Human Rights Council, Report of the Human Rights Council on Its Eighth Session, United Nations, 2008, hal. 30).

1.1.2. Human Rights Due Diligence dalam United Nation Guiding Principles on Business and Human Rights

The concept of the first Human Rights Due Diligence was coined by John Ruggie and published in the United Nations in the form of human rights principles called the United Nations Guiding Principles on Business and Human Rights, Implementing the United Nations "Protect, Respect and Remedy" Framework (UNGP) or known also with the name Ruggie's Principles (Business & Human Rights Initiative (2010), “How to Do Business with Respect for Human Rights: A Guidance Tool for Companies,” The Hague: Global Compact Network Netherlands. p. 21-22). This principle is the minimum guideline regarding things that must be done by the company so that it can be said not to commit human rights violations.


a. The obligation of the state to make and implement appropriate policies, regulations and adjudication to protect the threat of human rights violations committed by corporations;
b. Obligations carried out by corporations to respect human rights in the context of fulfilling due diligence to prevent and avoid human rights violations that can occur as a result of the operation of their business;

c. Provision of access to effective remedies for victims of human rights in both judicial and non-judicial dimensions.

In Professor Ruggie’s report the concept of due diligence is interpreted as an effort to identify, prevent and mitigate human rights violations that occur as a result of business activities carried out by corporations. These due diligence efforts include evaluating the impact of human rights violations that have occurred and will occur; integration and suitability of actions with facts obtained in the field; and responses to human rights violations and attempts to communicate how these human rights violations can be handled through the framework of implementation of due diligence (John Ruggie, “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (12) dalam Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc A/HRC/17/31, United Nations, 2011, p. 16).

Because it is a guideline, the existence of this UNGP is only an instrument to clarify various state and company actions which constitute an inhibition on respect, protection and restoration of human rights (Mathias Hariyadi, Protect, respect and remedy: Exercising human rights in business, https://www.thejakartapost.com/news/2015/05/03/protect-respect-and-remedy-exercising-human-rights-business.html (diakses April 15, 2019).). Therefore, in practice, these instruments are often considered blunt and weak. Not to mention the adoption of its principles in national law is only voluntary.

1.1.3. Human Rights Due Diligence in Legislation of Indonesia

Corporations as part of a legal entity also have the same responsibilities as the legal subjects of natural persons to respect human rights. This responsibility is reflected in the provisions of Article 28J paragraph (1) which states that every person must respect the human rights of others in orderly life in the community, nation, and state. Subsequently, paragraph (2) reaffirms the obligation of everyone to submit to the restrictions stipulated by law with the sole purpose of guaranteeing recognition and respect for the rights and freedoms of others. Corporations as legal entities can be interpreted within the scope of people who are also attached to the obligation to respect
human rights. The constitutional mandate is set forth in two legal rules that have governed the Human Right Due Diligence.

a. Regulation of the National Human Rights Commission Number 001 of 2017 concerning Ratification of the National Action Plan for Business and Human Rights

In this rule, explicitly stated in Human Rights Due Diligence in Article 4 paragraph (2) which states that "Assessment as referred to in paragraph (1) is a series of activities in the form of activities of business entity internal policy assessment, due diligence of human rights (due diligence), provides a mechanism for victim complaints and periodic reports to test the commitment of business entities in respecting human rights. "This rule is a guideline for preventing, handling, resolving and restoring human rights violations involving business entities. In this regulation it is also stated that the handling of cases of human rights violations by companies and the follow-up of complaints that will be processed by the National Human Rights Commission include conducting counseling and mediation. In addition, the National Human Rights Commission can also evaluate and give appreciation to business entities that respect human rights (Article 5 paragraph (1) Regulation of the National Human Rights Commission Number 001 of 2017 concerning Ratification of the National Action Plan for Business and Human Rights).

b. Ministerial Regulation on Human Rights System and Certification in the Fishing Industry No. 35 of 2015:

Human rights due diligence has been applied in business activities in the fishery sector in Indonesia. In celebration of International Human Rights Day December 2015, the Minister of Marine Affairs and Fisheries, Susi Pudjiastuti announced the enactment of Regulation of the Minister of Marine Affairs and Fisheries No. 35 of 2015 on Fisheries Rights System and Certification (Permen KP HAM Perikanan). Permen KP HAM Perikanan as a general provision the human rights regulation in the fishery field contains three main provisions. First, human rights standards that refer to UNGP principles. Second, due diligence to business actors to meet human rights standards. Third, the restoration of human rights or the reparation of victims from human rights violations (Perusahaan Wajib Punya Sertifikat HAM, http://koran.bisnis.com/read/20160816/452/57 5550/perusahaan-wajib-punya-sertifikat-ham, accessed April 20, 2019). Regulation of the Minister of Marine Affairs and Fisheries no. 35/2015 on the System and Certification of Human Rights on Fishery Enterprises has stipulated that the Task Force to Combat Illegal Fish Catching is required to have a Human Rights certificate).

In such a regulation, human rights due diligence is defined as a process undertaken by the Fisheries Entrepreneur to identify, assess, prevent, mitigate, and address the impact of human rights violations arising from the activities, operations and business relations of the Fisheries Entrepreneur (Republic of Indonesia, Article 1 point 14
The Concept of

Regulation of the Minister of Marine Affairs and Fisheries No. 35 of 2015 on Sistem dan Sertifikasi HAM Perikanan. Implementation of human rights due diligence carried out by Human Rights Team whose duty is to grant, reject, suspend and revoke fishery human rights certificate to Fishery Entrepreneur (Republic of Indonesia, Article 9 paragraph (4) letter c of the Minister of Marine Affairs and Fisheries Regulation No. 35 of 2015 on Sistem dan Sertifikasi HAM Perikanan). Each of fishery shall be equipped with a certificate of human rights in conducting their business activities obtained through the implementation of human rights due diligence. Without the certificate, fishery entrepreneurs will get sanction in the form of postponement of business permit, revocation of business license, recommendation of revocation of work permit to the Ministry of Labour (Republic of Indonesia, Article 8 and Article 12 of the Regulation of the Minister of Marine Affairs and Fisheries No. 35 of 2015 on Sistem dan Sertifikasi HAM Perikanan).

1.2 The Concept of Recovery in the National Human Rights Commission Regulation Number 001 of 2017 concerning the Ratification of the National Action Plan for Business and Human Rights

Theo Van Boven proposed the notion of recovery as all types of compensation that are both material and non-material for victims of human rights violations, which include aspects of the right to compensation, restitution and rehabilitation (Abdul Haris Samendawai, Hak-Hak Korban Pelanggaran HAM yang Berat: (Tinjauan Hukum Internasional dan Nasional),Jurnal Hukum No. 2 Vol. 16 April 2009, p. 256). Dalam lampiran National Human Rights Commission Regulation Number 001 of 2017 concerning Ratification of the National Action Plan for Business and Human Rights ini dikenal dua mekanisme pemulihan yaitu mekanisme yudisial dan non-yudisial. Dalam bab ini akan diuraikan mekanisme pemulihan dalam sistem hukum di Indonesia dan karakteristik human right due diligence sebagai suatu mekanisme yang berbeda.

1.2.1. The Concept of Recovery for Victims by Corporations in Various Legal Instruments in Indonesia

a. Corporate Social Responsibility (CSR)

The concept of CSR relies heavily on the goodwill of PT to include CSR funds in its annual budget or not. Even if it is included, is the value comparable for community empowerment and maintaining environmental quality. Mr. Yaya W. Januardy as
President of Indonesia Global Compact Network said that CSR is only a philanthropic concept (generosity). In addition, the implementation of CSR has proved to be inaccurate in answering the problem of social and environmental impacts due to the operation of a corporation. (The material was delivered by Yaya W. Januardy (President of Indonesia Global Compact Network) at the national business and human rights conference at the UGM Faculty of Law held by ELSAM on November 15, 2015).

b. Civil Lawsuit

Corporation as a legal entity has a legal personality as a legal subject (M. Yahya Harahap, Hukum Perseroan Terbatas, (Jakarta: Sinar Grafika, 2011), p. 116) so that the capacity and responsibility are the same as humans in general to do legal actions. In terms of civil liability, there are no significant problems regarding corporate responsibility in the field of civil law, because the type of sanctions imposed on the field of private law are in the form of assets or money, so the corporation also has wealth that can fulfill responsibilities in the field of civil law.

c. Criminal Claims

Corporations as legal entities have consequences for being responsible like the subject of human law, so that the attachment of criminal responsibility to corporations is possible. Basically, the criminal liability of the company can only be imposed with a fine if the criminal offense deserves a fine, but there is a criminal act that is difficult to reach the corporation by imposing fine sanctions, such as rape, murder and other similar acts. For this type of criminal, the company is placed as aiding and abetting criminal acts, based on such construction there are penalties imposed on corporations, and criminal sanctions for imprisonment for those who commit ((M. Yahya Harahap, Hukum Perseroan Terbatas, (Jakarta: Sinar Grafika, 2011), p. 150).

d. Good Corporate Governance

The obligation of corporations to implement corporations in Indonesian positive law is still vague. These provisions are contained in the explanation of Article 4 Company Law which states: "The enactment of this law, the Company’s articles of association, and other statutory regulations, does not reduce the obligation of each Company to comply with good faith principles, appropriateness principles, propriety principles and governance principles Good corporate governance in operating the Company."
1.2.2. The Concept of Recovery for Victims in Human Rights Due Diligence by Corporations in Indonesia

Corporation can be said to carry out their human rights responsibilities if they do 3 main things, namely 1) Having a human rights commitment policy that is reflected in each SOP up to its subsidiaries; 2) Carry out in earnest the identification, prevention, reduction, and calculating the impact and resolution due to bad human rights due to the company (human rights due diligence); 3) Undertake recovery from the effects found from Human Right Due Diligence. The concept of recovery listed in Ruggie’s Principles as also outlined in the National Human Rights Commission Regulation No. 001 of 2017 concerning the Ratification of the National Action Plan for Business and Human Rights consists of three ways, namely:

a. State-Based Legal Mechanism;
   This mechanism is provided by the state as a step for recovery of human rights violations through domestic legal channels such as the judiciary, or commissions. The state is also obliged to guarantee that this mechanism is effective with no obstacles.

b. State-Based Non-Legal Complaint Mechanism;
   This is in the form of a mediation-based process, adjudicator, or following other ways that are culturally appropriate and compatible with rights or involving several combinations depending on the related issues, any public interests involved, and potential needs of the parties. In this mechanism, national human rights institutions have a very important role.

c. Non-State-Based Complaint Mechanism.
   One category of non-state-based grievance mechanisms includes those regulated by a business company itself or with a related party, by an industry association or a group of related parties. This mechanism is non-legal, but can use the adjudicative, dialogue or other processes in accordance with the culture and in accordance with the rights. These mechanisms can offer benefits such as ease of access and recovery, reducing costs and / or transnational achievements.

1.2.3. Benefits of the Implementation of Human Rights Due Diligence in Business Activities in Indonesia

The implementation of Human Rights Due Diligence is massive and comprehensive in a business activity. With the implementation of the Human Rights Due Diligence in a corporation, a corporation with a qualified track record of human rights will have a good reputation for its customers. By itself this condition will lift the morale of workers so that they are motivated and more productive because they feel safe and comfortable working in the corporation. In addition, corporations will also easily retain their best employees while strengthening operating licenses and facilitating their business activities including developing market segments and the number of new consumers and
investors. Corporations that obey human rights naturally will also have good relations with the environment and surrounding communities that will influence the sustainability of their business operations and reputation. On a global scale, the necessity to implement human rights values in business activities is a must. So if the company is operationally complying with the principles made by the United Nations, a global connection will be easily obtained (Sebuah Rencana Aksi Bertema Bisnis dan HAM https://www.hukumonline.com/berita/baca/lt596f0f1b24e4/sebuah-rencana-aksi-bertema-bisnis-dan-ham, accessed 19 April 2019).

**CONCLUSION**

Transnational corporations and businesses are believed to be third parties that can threaten the fulfillment of individual and community human rights. This is evident in 2012-2016 according to the National Commission on Human Rights, corporations are the most common violators of human rights violations. This is important to implement the United Nations Guiding Principles on Business and Human Rights which have been explicitly found in two national regulations, namely Regulation of the National Human Rights Commission Number 001 of 2017 concerning the Ratification of the National Action Plan for Business and Human Rights and Ministerial Regulation on Human Rights and Certification in the Fishing Industry No. 35 of 2015;

Recovery in the legal system in Indonesia related to business activities in the form of Corporate Social Responsibility (CSR), Civil Lawsuits, Criminal Claims and Good Corporate Governance. But each of these recovery concepts still has weaknesses and is partial. Human rights due diligence offers a comprehensive concept of recovery that is both preventive and repressive consisting of State-Based Legal Mechanisms, State-Based Non-Legal Complaints Mechanisms, and Non-State-Based Complaints Mechanisms. Therefore, by implementing Human rights due diligence on business activities, it can enhance corporate reputation both nationally and globally.

**REFERENCE**


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Arief Dwi Meiwarto,

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