

Komnas HAM, Investigating Serious Human Rights Violations: Dynamics and Challenges

Amiruddin

Lecturer of the Faculty of Law University of Bhayangkara Jakarta Raya

Deputy Chairperson of Komnas HAM - RI

Email: amiruddin.alrahab@gmail.com

Abstract

This paper reviews the dynamics and challenges of the investigation conducted by Komnas HAM in accordance with Law No. 26/2000 of the Human Rights Court. In addition, this paper also explains the dynamics between Komnas HAM and the Attorney General as an investigator in Law No.26/2000. A critical related issue is the provision of the authority to investigate the National Human Rights Commission and the Attorney General's Office, which have been a serious obstacle to resolving gross human rights violations in Indonesia. This article also provides an analysis of the likely challenges faced by Komnas HAM in future investigations.

Key Words: Komnas HAM, The Attorney General, Serious Human Rights Violations, the Human Rights Court

I. PRELIMINARY

Though the Law on Human Rights Courts is 20 years old, its existence has only just begun to impact the community. The passive role of the Court may stem from differences in views between Komnas HAM and the Attorney General as investigators, especially in terms of formal requirements and the materials under investigation, which are related to sufficient preliminary evidence.

The cases of serious human rights violations in East Timor, Tanjung Priok, and Abepura, Papua, did not trigger the same difference of opinion. This can be seen from the follow up of the results of the Komnas HAM investigation into the investigation. Prosecutions for the East Timor and Tanjung Priok incidents were held at the Jakarta Human Rights Court, and the Makassar Human Rights Court for the Abepura, Papua incident.

Differences began to emerge after the human rights trials for these three incidents held in 2004-2005. Considering the lasting impact of the differences between Komnas HAM and the Attorney General that continues to divide opinions to this day, it is certainly interesting to examine why this happened, and how the dynamics work.

II. KOMNAS HAM BACKGROUND AS AN INVESTIGATOR

East Timor has been used as a military operation area (Daerah Operasi Militer - DOM) by the Government of Indonesia since the beginning of the reformation period in 1975. In order to control the unstable situation in East Timor, President Habibie agreed to hold a referendum on the independence of the province in early 1999. The results demonstrated that the majority people in East Timor wanted to separate from Indonesia.¹

After the poll, allegations of serious human rights violations in East Timor rose tremendously. The UN High Commissioner for Human Rights urged for an investigation into the alleged made in East Timor since January 1999, triggering the establishment of the *International Commission of Inquiry on East Timor* (CIET). Its findings confirmed suspected serious human rights violations in Timor-Timor, proposing the establishment of an Independent Investigation Team by the United Nations and the establishment of an international tribunal to hold perpetrators accountable. This later developed into UN Security Council Resolution No. 1264, issued in September 1999, stating that the perpetrators must be held accountable.

Under the pressure of international investigation and human rights trials in East Timor, the Indonesian government finally began to pursue legal accountability for the perpetrators. To that end, President Habibie proposed PERPPU No.1/1999 to the Human Rights Court in October. Although this PERPPU was rejected by the DPR-RI in early 2000, the pursuit of accountability continued until the DPR-RI finally approved Law No.26/2000 on the Human Rights Court toward the end of 2000.

At the time this Law emerged there were very low levels of public trust in Indonesian law enforcement agencies, both at home and abroad. Existing legal institutions were perceived to be an extension of the authoritarian regime that had just fallen. Additionally, issues of corruption and the influence of high-ranking ABRI (Republic of Indonesia Armed Forced) officials² obstructed the pursuit of justice. To build the international and national community's confidence in the pursuit of truth and accountability for allegations of gross human rights violations in East Timor, the investigation was submitted to Komnas HAM.

1 Regarding the development of the situation in East Timor, see Bilveer Singh, *East Timor, Indonesia, and the world: Myths and realities* (Jakarta: Social Studies, 1998).

2 Remember in 1999, the Police were still part of ABRI.

With the support granted by Law No. 39/1999³, Komnas HAM's work has become stronger and wider. Previously, Komnas HAM's performance had aligned with the expectations of the human rights community, successfully demonstrating its independence in uncovering human rights violations. Notable examples include revealing the involvement of TNI members in human rights violations in Timika-Papua, the Marsinah case, the Sampang case, the Jengawah case, and the attack on the PDIP office in Jakarta.⁴

Lay and Pratikno noted that before Komnas was given the authority of *pro-justicia* investigator through Law No. 26/2000 of the Human Rights Court. The Law states:

“...learning from the 1993-1997 period, the independence of Komnas HAM does not come from purely juridical support. While Komnas HAM had formal limitations and financial dependence on the executive, this institution was able to build its independence from the state. The independence possessed by Komnas HAM cannot be separated from the collective energy that supports the creation of these conditions. Internally, this collective energy is built on the capacity of individual Komnas HAM members who have high integrity and dedication to upholding human rights. Meanwhile, externally, the existence of strong public support and trust is part of Komnas HAM's independence energy.”⁵

III. SCOPE OF AUTHORITY OF KOMNAS HAM AS AN INVESTIGATOR

Law No. 26/2000 defines an investigation as: "actions [taken] to seek and discover whether or not an event is suspected of being a gross violation of human rights.” Chapter Four, Article 18 states that “an investigation into gross human rights violations is carried out by Komnas HAM. In carrying out the investigation Komnas HAM may form an ad hoc team consisting of the National Human Rights Commission and elements of the community.

This, of course, differs from the definition of investigator set out in the Criminal Procedure Code, marking a significant departure from the norm, namely that Komnas HAM was granted the authority to form ad hoc teams. Article 19 of Law No. 26/2000 further explains that Komnas HAM's investigation rests on the context of *pro justicia*. This demonstrates that the entire process of disclosing gross human rights violations was initiated by an institution that has strong independence and has no interest.

3 *Indonesia - Law on Human Rights (No. 39 of 1999)*, 1999.

4 Regarding the actions of Komnas HAM, see Cornelis Lay, ed, *Komnas HAM 1998-2001: Struggle in Political Transition* (Yogyakarta: Fisipol UGM, 2002).

5 *Ibid* at 111.

Because this institution is not part of the power, the objectivity and fairness of the investigation is maintained.

Meanwhile, the definition of gross human rights violations, as stated in Article 7, Chapter III, refers to two types of crime: genocide and crimes against humanity.⁶ According to the Law on Human Rights Court, Komnas HAM only has the authority to investigate these two crimes. The crime of genocide, in accordance with the Law on the Human Rights Court in Article 8, is defined as:

"any act carried out with the intention of destroying or exterminating all or part of a national, racial, ethnic group, religious group, by killing members of the group; cause serious physical or mental harm to group members; create conditions of living for the group which will result in its physical destruction in whole or in part; imposing measures aimed at preventing births within the group; or forcibly transferring children from one group to another."

Here, "group member" refers to "a person or more members of the group."

Meanwhile, crimes against humanity, in accordance with Article 9 of the Law on the Human Rights Court, is defined as:

"an act committed as part of a widespread or systematic attack knowing that the attack was directed directly against the civilian population, in the form of: murder; extermination; slavery; forced expulsion or displacement of the population; deprivation of liberty or deprivation of other physical freedoms arbitrarily in violation (principles) of the main provisions of international law; torture; rape, sexual slavery, forced prostitution, forced pregnancy, sterilization or forced sterilization or other equivalent forms of sexual violence; persecution of a certain group or association based on political equality, race, nationality, ethnicity, culture, religion, gender or other reasons that have been universally recognized as prohibited under international law; enforced disappearance; or the crimes of apartheid."

Here the intent of "an attack directed directly against the civilian population" is "an act committed against the civilian population as a continuation of the **policy of the authorities** or **policies related to the organization**."⁷ This means that every crime act referred to in Article 9 must contain a statement demonstrating that the act has a direct

6 According to the explanation of article 7, the definition of these two forms of crime refers to the Rome Statute of the International Criminal Court . The Rome Statute is a statute to establish an international tribunal in order to try internationally the perpetrators of serious crimes in this world. There are four types of crimes under the jurisdiction of the ICC, namely Genocide, Crime Against Humanity, War Crime and Aggression. Indonesia's Law on Human Rights Courts only takes two types of crimes.

7 See explanation of article 9, *Law of Republic Indonesia number 26 of 2000 on Human Rights Court*, 2000.

relationship with the continuation of the policies of the authorities or organizations and the target is really the civilian population.

To investigate these two types of crime KOMNAS HAM, as the investigator, was granted the authority to:

- a. Conduct investigations and examinations of events that arise in the community based on the nature or scope of which it is reasonable to suspect that there have been gross violations of human rights.
- b. Receive reports or complaints from a person or group of people regarding the occurrence of serious human rights violations and seek information or evidence.
- c. Summon the complainant, the victim, or the party being complained about for questioning and hearing their statement.
- d. Summon witnesses to be asked for and hear their testimonies.
- e. Reviewing and collecting information at the crime scene and other places deemed necessary.
- f. Calling related parties to provide written information or submit the required documents in accordance with the original.
- g. At the order of the investigator, the investigator may take the following actions:
 1. Checking the letter.
 2. Search and seizure.
 3. Local inspection of houses, yards, buildings and other places occupied or owned by certain parties.
 4. Bring in experts in connection with the investigation.

Upon completion of the investigation, KOMNAS HAM believed there was sufficient preliminary evidence to support allegations of serious human rights violations, the results of this investigation were submitted to the Attorney General within 7 working days of the KOMNAS HAM Plenary Session.

IV. KOMNAS HAM INVESTIGATION PROCESS AND RESULT

Considering the background and content of Law No.26/2000, it seems obvious that the legislators intended for this law to be used in *extraordinary circumstances* to deal with *extraordinary crimes*. As such, it has the authority to delegate investigations to independent institutions such as KOMNAS HAM. The prosecution is carried out by the Attorney General. Further, the court used is also special, namely the Human Rights Court, with Human Rights Prosecutors and Human Rights Judges, who are also specially recruited. The extraordinary nature of the crimes investigated by KOMNAS HAM

relates to the alleged involvement of the state apparatus, especially the security forces.⁸ Incidents must first be assessed by KOMNAS HAM to establish whether they are to be considered human rights violations for the investigation.

This study was carried out by by KOMNAS HAM in accordance with Law No.39/1999 on Human Rights. Expert consultants were brought in to support the study and conduct specialised analyses of different aspects of the incidents. The results were brought to the KOMNAS HAM Plenary Session where they were assessed to determine whether the incidents needed required further investigation. If the results are deemed sufficient, and supported by strong witness statements and documentation, the plenary session will decide whether the incident should be increased by projusticia investigation, in accordance with the mandate of Articles 18 and 19, Law No.26/ 2000, concerning the Human Rights Court.

If an incident required further investigation the KOMNAS HAM Plenary Session will form an ad hoc Investigation Team, consisting of several commissioners from the National Human Rights Commission and other professional segments of society such as academics, community leaders, and NGOs.

Throughout the investigation process the Team is directed by a Commissioner appointed by the plenary session. The results of the investigation are reported at the KOMNAS HAM plenary session where they are assessed for completeness and whether they can be transferred to the Attorney General.

KOMNAS HAM must obtain sufficient preliminary evidence to support claims that the incidents meet the conditions of crimes against humanity or the crime of genocide as stated in articles 7, 8, and 9 of Law No.26/2000.

Of course, this initial evidence must demonstrate that there is an *element of crime* related to the type of crime committed. The main elements of crimes against humanity are that it is ‘widespread or systematic attack against a civilian population’. In this case, there was sufficient evidence to support claims that it constituted a crime against humanity.

In KOMNAS HAM investigations, the ‘widespread’ element can be demonstrated by evidence of the scale of victims in an incident or series of incidents. It can also be demonstrated by the geographical distribution, scale, or repetition of the actions taken.

‘Systematic,’ refers to an action that involves elements of planning or that show the same pattern, are interconnected in the same way, and are repeated. The systematic action must be aimed directly at the civilian population. As such, KOMNAS HAM investigators must prove that the victim is a civilian. Where the attack is a continuation of the policy of a ruler or organization, it must be proven at the outset by official

⁸ As of 2021, there are 13 files of investigation results that have not been followed up by the Attorney General for investigation.

documents that underlie the actions.⁹ In short, to meet the systematic requirement an attack must show the existence of planning, the use of official resources, and the involvement of competent authorities. To constitute an attack on the civilian population, it must target persons who are not military personnel or armed combatants.

In the KOMNAS HAM investigation process, sufficient preliminary evidence can be formulated based on information obtained from witnesses, documents, field observations/examinations, or expert statements relating to: (1) instructions on policy elements (planning) of crimes; (2) indications that the attack was widespread in terms of victims or geographical spread; (3) repeated actions; (4) indications that the victims were civilian; (5) indications of the involvement of the authorities; or (6) indications that the facilities used were official facilities.

Given that there are no standard provisions to define 'sufficient initial evidence' in Law No.26/2000, KOMNAS HAM has attempted to formulate its own definition. In order to meet the requirements of the investigation, KOMNAS HAM should compile a report that demonstrates the supporting evidence and facts they have gathered. The report constitutes a description of the event, including when the incident occurred, who the victims were, and an estimate of the perpetrator.

Reference to Article 184 of the Criminal Procedure Code indicates that the supporting evidence is witness testimony, expert testimony, letters, instructions, or the defendant's essay. Sufficient preliminary evidence is the minimum evidence that investigators need to obtain to support an initial claim, there must be at least two forms of evidence referred to in Article 184 of the Criminal Procedure Code. In the context of the KOMNAS HAM investigation dossier, the minimal evidence has been met.

Meanwhile, KOMNAS HAM considers the formal requirement that the investigator is sworn in unnecessary because it is not required by Law 26/2000. In addition, KOMNAS HAM considers that the investigative powers granted by Law 26/2000 to be *lex specialis*. This is also supported by previous experiences where investigators in incidents of gross human rights violations in East Timor, Abepura, and Tanjung Periok were not sworn in. Notwithstanding, the results of the KOMNAS HAM investigation were followed up by the Attorney General for investigation and tried at the Human Rights Courts in Central Jakarta and Makassar.

According to Article 20 of Law 26/2000, the results of KOMNAS HAM investigations must be submitted to the investigator, namely the Attorney General. If the investigator considers the results of the investigation to be incomplete, they return the dossier to be reviewed with instructions and returned within 30 days. The clash of opinions between KOMNAS HAM and the Attorney General as investigators emerged at this juncture due to disagreements regarding the completeness of the results of the investigation, especially relating to sufficient preliminary evidence.

9 *Law of Republic Indonesia number 26 of 2000 on Human Rights Court, supra note 7.*

The Attorney General questioned the results of KOMNAS HAM's investigation from a formal, material perspective.¹⁰ 'Formality' is a condition relating to the validity of an investigation and its documents, namely the existence of an oath from the investigators and an investigation report, both in obtaining documents and other evidence, as well as in examining people. Meanwhile, 'materially' relates to various other kinds of evidence to support all the information presented in the KOMNAS HAM investigation dossier. In KOMNAS HAM's view, the Attorney General's request exceeded the investigator's authority. As a result, the differences of opinion between KOMNAS HAM and the Attorney General became a protracted issue.

Since at least 2002, the Attorney General has questioned this formal issue. The chairman of KOMNAS HAM for the period 2002-2007, Abdul Hakim Garuda Nusantara, once stated that the formal requirements questioned by the Attorney General for the files resulting from the KOMNAS HAM investigation were 'old songs'. This means that the Attorney General has repeated their request this since KOMNAS finished the Tanjung Priok investigation. In this case, when the results of the investigation into the East Timor incident were filed, the question regarding the formal requirement that the investigator must be sworn in did not arise. Since then, KOMNAS has held that investigators do not need to be sworn in.

The KOMNAS investigation process also began to be questioned by the TNI and POLRI through their appointed attorneys. What is at issue is the authority of KOMNAS HAM to investigate events that occurred before the Law on the Human Rights Court was passed. KOMNAS HAM was not considered authorized to conduct investigations before the Human Rights Court was established at the suggestion of the DPR-RI. Since the investigation into the case of enforced disappearances in 2005, people from the TNI and POLRI institutions became unwilling to attend KOMNAS HAM summons to hear their statements about incidents.¹¹ There have also been refusals during the investigation for the Talangsari incident, Lampung, from retired TNI and Polri officers. Even the Attorney General refused to issue a warrant to conduct inspections at several locations in Lampung.¹²

During the investigation of the PETRUS (Penembakan Misterius- anonymous shot) Incident in 2008, people from the TNI and POLRI refused to hear their statements as

10 Ken Setiawan, *K.M.P., Promoting Human Rights: National Human Rights Commissions in Indonesia and Malaysia. MI-220* (Amsterdam: Leiden University Press, 2013) at 60-63.

11 Tim Penyelesaian Pelanggaran HAM Masa Lalu Komnas HAM, "Executive Summary Report on the 1997-1998 Enforced Disappearances" in *Executive Summary Report on Investigation of Serious Human Rights Violations* (Jakarta: Komisi Nasional Hak Asasi Manusia (Komnas HAM), 2014).

12 Tim Penyelesaian Pelanggaran HAM Masa Lalu Komnas HAM, "Executive Summary of the Talangsari Incident Report" in *Executive Summary Report on Investigation of Serious Human Rights Violations* (Jakarta: Komisi Nasional Hak Asasi Manusia (Komnas HAM), 2014).

witnesses.¹³ The investigative Team for the May 1998 Riots was also unable to examine people from the TNI and POLRI, because their legal advisory team argued that KOMNAS was not authorized to carry out investigations before an ad hoc human rights court was formed at the suggestion of the DPR-RI. Even the TSS KPP-HAM Team, which carried out the investigation in 2001, felt that they were being hindered by officers from the TNI and Polri.¹⁴ The non-arrival of TNI members was summoned by KOMNAS HAM to be heard and continued until the investigation into the 2020 Paniai incident.

Along with the rejections from members of the TNI and Polri, the Attorney General also began to question the material requirements of the KOMNAS HAM investigation. The material requirements in question range from asking for the names of each member of the TNI or Polri who are in the field, to the origin of the suspected perpetrator unit. They were even asked about the motives of the people suspected of being involved. Even KOMNAS HAM was asked to conduct an examination of officials from the TNI or Polri who were suspected to be related to the incident. Furthermore, the Attorney General asked KOMNAS HAM to prove that the victims in every incident of gross human rights violations were civilians, through their identity or family cards. KOMNAS HAM was also asked to attach original documents, such as an operating order from the leadership of the TNI or Polri units involved in an incident.

Given the refusal of the TNI and POLRI to provide information and cooperate with the KOMNAS HAM Investigation Team from 2001 to 2021, it is impossible for the Attorney General's request to be fulfilled. Therefore, KOMNAS responds to the will of the Attorney General that it has entered the authority of the Attorney General as an investigator because they have stronger authority to obtain this information. Further, KOMNAS is of the opinion that the files produced from their investigation are sufficient to provide clues that the Attorney General needs to obtain to strengthen the results of the investigation.

V. THE FUTURE OF KOMNAS HAM INVESTIGATIONS?

Considering that Law No.26/2000 is 20 years old, and its implementation is disappointing, a renewal of national commitment is needed to regulate the exercise of power and prevent its exploitation. Judging by the events over the past 20 years, that commitment doesn't seem to exist. As a result, all events cannot be examined in court.

13 Tim Penyelesaian Pelanggaran HAM Masa Lalu Komnas HAM, "Executive Summary of the 1982-1985 Petrus Incident Report" in *Executive Summary Report on Investigation of Serious Human Rights Violations* (Jakarta: Komisi Nasional Hak Asasi Manusia (Komnas HAM), 2014).

14 *Executive Summary of KPP HAM TSS Report*, by ELSAM (Jakarta: ELSAM, 2002).

The future of the Law on the Human Rights Court relies on the commitment of all parties to law enforcement for incidents of gross human rights violations. This commitment can be realized through the imminent revision of Law 26/2000.

The revision must strengthen its relation and commitment to the Rome Statute of the International Criminal Court as well as the clarity of the procedural law. There is a need for a separate procedural law relating to investigations, especially regarding the meaning of "sufficient preliminary evidence". Further, there must also be clarification of the meaning of "continuation of the ruler's policy" so that the human rights court can more easily hold policy makers accountable. In addition, the time span for the investigation should be changed so that investigators have sufficient time to follow up on the results of the investigation. Without renewing commitments and making revisions, this Law on Human Rights Courts will have no future.

BIBLIOGRAPHY

- Commission of Truth and Friendship (CTF), Indonesia-Timor-Leste, *Per Memoriam Ad Spem: Final Report of Commission of Truth and Friendship (CTF), Indonesia-Timor-Leste*, by Commission of Truth and Friendship (CTF), Indonesia-Timor-Leste (Denpasar: Commission of Truth and Friendship (CTF), Indonesia-Timor-Leste, 2008).
- ELSAM, *Executive Summary of KPP HAM TSS Report*, by ELSAM (Jakarta: ELSAM, 2002).
- Indonesia - Law on Human Rights (No. 39 of 1999)*, 1999.
- Law of Republic Indonesia number 26 of 2000 on Human Rights Court*, 2000.
- Lay, Cornelis, ed, *Komnas HAM 1998-2001: Struggle in Political Transition* (Yogyakarta: Fisipol UGM, 2002).
- Nevins, Joseph, *Massacres in East Timor, International Community Horror* (Yogyakarta: Galang Press, 2008).
- Setiawan, Ken, *K.M.P., Promoting Human Rights: National Human Rights Commissions in Indonesia and Malaysia. MI-220* (Amsterdam: Leiden University Press, 2013).
- Singh, Bilveer, *East Timor, Indonesia, and the world: Myths and realities* (Jakarta: Social Studies, 1998).
- The Criminal Procedure Code and the Criminal Code Act*, 1981.
- Tim Penyelesaian Pelanggaran HAM Masa Lalu Komnas HAM, *Executive Summary Report on Investigation of Serious Human Rights Violations* (Jakarta: Komisi Nasional Hak Asasi Manusia (Komnas HAM), 2014).

- , “Executive Summary of the 1982-1985 Petrus Incident Report” in *Executive Summary Report on Investigation of Serious Human Rights Violations* (Jakarta: Komisi Nasional Hak Asasi Manusia (Komnas HAM), 2014).
- , “Executive Summary of the Talangsari Incident Report” in *Executive Summary Report on Investigation of Serious Human Rights Violations* (Jakarta: Komisi Nasional Hak Asasi Manusia (Komnas HAM), 2014).
- , “Executive Summary Report on the 1997-1998 Enforced Disappearances” in *Executive Summary Report on Investigation of Serious Human Rights Violations* (Jakarta: Komisi Nasional Hak Asasi Manusia (Komnas HAM), 2014).

Amiruddin is a commissioner of the National Commission of Human Rights of the Republic of Indonesia (KOMNAS HAM) since 2017. Prior to joining KOMNAS, he had been active in several human rights organisations such as Indonesian Legal Aid Institute (YLBHI), Lembaga Advokasi & Advokasi Masyarakat (ELSAM), and The Indonesian Institute of Sciences (LIPI). He received a master’s degree in political sciences from the University of Indonesia in 2007 and has become a lecturer at Bhayangkara University, Jakarta.