

Human rights obligations for Non-State Actors (NSAs): Challenges and Recommendations

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This article aims to review the human rights obligation for Non-State Actors (NSAs), analyze the challenges for implementing the obligations as well as provide recommendation for every challenge. Before discussion on human rights obligation, providing brief description on definition, categories, and roles is important in order to give some thoughts related to NSAs.

Definition and categories:

The term ‘Non-State Actors’ is defined and categorized differently. The Special Rapporteur on the situation of human rights defenders explained the term NSAs as “people, organizations, groups and corporations not composed of State agents or not being State organs” (A/65/223, 2010) Similar to the Special Rapporteur, NSAs is traditionally defined as “group” or any kind of corporation that is supposed to have more than one person. By such definition, it is interesting to analyze whether one person can act as same as non-state actor under the development of communication technology today that allows individual to establish and manage so-called organization without cooperation with others.

Besides definition, categories of NSAs are differently divided but generally into four groups.

According to August Reinisch (2002); NSAs include: 1) International Organizations (IOs), 2) Non-governmental Organizations (NGOs), 3) International Financial Institutions (IFIs) which generally means World Bank (WB) and International Monetary Fund (IMF) and 4) Transnational Corporation (TNCs) or Multinational Enterprises (MNEs). The Special Rapporteur on the situation of human rights defenders (2010) categorized type of NSAs based on the violations to human rights defenders, that are: 1) armed groups, 2) national and TNCs, 3) other types of NSAs and 4) media. Nicholas David et al. (2014) mapped NSAs into: 1) TNCs and financial services, 2) civil society (CS) including NGOs and stakeholders, such as women groups, 3) IFIs and 4) human rights defenders (HRDs).

Except IFIs, each group of NSAs seems not to totally separate from each other; particularly, large or worldwide NSAs like Amnesty International (AI) or Save the Children that can be entitled IOs or INGOs or NGOs (Baehr, 2001). Variety of NSAs categories also brings about some questions as follows;

- Whether NSAs should include “illegal groups” as the Special Rapporteur on the situation of human rights defenders (2010) included armed groups as one of NSAs; if so, the other NSAs, such as sex businesses or casino should be included as NSAs and further required to obligated human right principles?
- According to the explanation about other types of NSAs¹, whether individuals like landowners or other groups of people like ethnic minorities should be included as part of NSAs? If so,

¹ See A/65/223, paras. 13-16.

what will be different between them and NSAs established as legalized organizations on human rights obligations and in this case, it means that everyone in the society will be identified as NSAs because the person anyway is a member of at least one group identified itself based on social, economic, political and/or cultural interest.

- The scope of NSAs seems to be more international or regional than national or local one because TNCs is considered part of NSAs and it is quite important NSAs for human rights academicians or activists. However, local business sectors, such as Small-Medium Scale Enterprises (SMEs) and Social Enterprises (SEs) are not explicitly included as NSAs. On the other hand, SMEs and SEs become part of Corporate Social Responsibility (CSR) of some TNCs as recommended by Forum Asia²

Roles of NSAs:

Roles of NSAs can be explained differently based on different perceptions. In this article, the roles of NSAs will be described based on 1) relationship with States and other NSAs and 2) purposes of establishment. The observations are provided at the end of this session.

Relationship with States and other NSAs:

Typically, States including TNCs were identified as “bad guys” while NSAs; especially, NGOs, CS, IOs, were considered “good guys” (Reinisch, 2002) because NGOs are supposed to investigate whether States and TNCs are involved with human rights violation in any mean. Therefore, the main role of NSAs like NGOs is to investigate States and TNCs under the scope of human rights obligations.

However, the role of NSAs; such as NGOs and TNCs have been changed. Nowadays, the roles of NSAs can be divided into two forms: corporation and investigation, based on the relationship with States and among NSAs:

- *Corporation:*

Today, a number of NGOs are engaged with States in different platforms; such as being the consultants of the government on relevant social development policies and law amendment. NGOs cannot be established without State recognition. It is essentially important for NGOs to access to the government because the powerful channel for them to raise the public awareness on whatever issues they are working on (Baehr, 2001). At the same time, it is recommended for NGOs working on the same issues to cooperate in order to avoid duplication of work and raise the power of bargain with the government.

However, some NGOs received financial support from the government to launch the project. By doing so, it is quite difficult for those NGOs to play as State investigators. Some NGOs even promote the governmental policies as mentioned by Susan J. Pharr (2003; cited in Ogawa, 2014) in the study of the roles of NGOs and civil society in Japan in the article *Civil society: past, present and future*, that “the Japanese state has successfully institutionalized specific kinds of civil society groups to promote state

² See Forum Asia, 2013, **Corporate Accountability in ASEAN: A Human-Rights Based Approach**, stated that “The research on behalf of the OECD recommends that ASEAN companies move from “philanthropy CSR” to “strategic CSR,” engage further Small and Medium Scale Enterprises (SMEs), develop accountability and corporate governance policies, and engage in existing CSR initiatives such as ISO26000”

ideology while marginalizing those [civil society groups] that take critical and independent stands” For this type of NGOs, their role may be manipulated by the government that can probably lead them to lack concern on human rights obligation of States which is their initial purpose to establish NGOs.

The cooperation between States and TNCs and between TNCs and TNCs are common situation. The first group of cooperation is state-investor relationship (IHRB and GBI, 2012) that usually found in so-called Mega Project like dam or road construction requiring big support in terms of financial and/or professional, from private sectors³. The cooperation between TNCs and TNCs or between business sectors can be divided into at least five types: joint ventures, mergers, acquisitions and disposals, franchising and licensing, suppliers and service providers, and direct customers⁴. Each type of business relationship is recommended to apply the human rights principles in different way from the starting to ending of the relationship.

The cooperation between States and TNCs and between States and NGOs produce different impact on those NSAs and States. States that have been cooperating with TNCs for years are probably manipulated by TNCs through interference in policies; for example, the case of cooperation between Lao government and Imperial Tobacco, that further the tobacco industry proposed the unfair policy on tobacco taxation that makes government of Lao PDR loses a big amount of tobacco tax income. The same situation happened in many countries worldwide; particularly, low and middle income countries⁵. Sometimes, with the powerful interference of TNCs, the government cannot respect, protect and fulfill human rights as obligated.

On the other hand, States can mobilize NGOs; particularly, local and national NGOs funded by States, to support and promote government policies. NGOs can play important role to access to local communities and utilize such opportunity to make local people have better understanding on public policies or social welfare related to their life. It is not surprising that after working in NGOs for years, some senior staff become part of governmental bodies; such as senators or politicians. The cooperation between States and International NGOs (INGOs); such as UN agencies, is not much related to politics but more on project and policy support, information sharing and technical assistance and so on, as some INGOs identify themselves as supportive organizations for launching public policies; for example, UNICEF that organizes the consultation to support public policies on child rights protection in certain countries.

- *Investigation:*

The general role of NGOs, CS and INGOs; especially, ones working more or less on political-relevant issues; such as Amnesty International and Human Rights Watch (HRW), Forum Asia etc. is to investigate whether States can respect, protect and fulfill human rights as obligated with the strategy called “Mobilization of Shame” (Baehr, 2001). Each NGOs and INGOs have different targeted areas to

³ See *supra*, Forum Asia, case studies.

⁴ See Institute for Human Rights and Business (IHRB) and Global Business Initiative on Human Rights (GBI), 2012, **State of Play: The Corporate Responsibility to Respect Human Rights in Business Relationships**, for definition and ‘respect for human rights’ in each business relationship, including investor-state relationship.

⁵ See **SEATCA Tobacco Tax Index 2015** for more information on the cooperation between Imperial Tobacco and Lao government, [http://seatca.org/dmdocuments/SEATCA%20TOBACCO%20TAX\(17SEPT15\)WEB.pdf](http://seatca.org/dmdocuments/SEATCA%20TOBACCO%20TAX(17SEPT15)WEB.pdf)

work on; for example, AI initially works for the release of prisoners of conscience, HRW's first focus on abuses in the context of armed conflict and Forum Asia that calls for regional human rights agreement in ASEAN (Neier, 2012). Besides investigating States, some NGOs work on corporates investigation. TNCs become main target of a number of NGOs working on human rights for different groups, such as labors, women, children, and indigenous groups, to investigate any human rights violation generated by TNCs. Some TNCs and States pay an effort to cooperate with NGOs and work with NGOs as partners in order to appropriately comply human rights principles into their management system (Reinisch, 2002). However, it is also possible that some NGOs may be compelled to stop working when their work considered dangerous for States; basically, in state security. For example, in 2015 Thai government decides to deactivate the website of HRW when HRW criticized freedom of expression and other political issues in the country.

Purposes of establishment:

IFIs and TNCs have quite clear purpose of establishment that is to provide financial support to state members (Anghie, 2004)⁶ and to make profit through business activities with decision made on regional or global alternatives (Hadari, 1973; cited in Greer and Singh, 2000), respectively. However, the purpose of establishment can also affect working principles, missions, strategies and expected outcome in specific issues they are working on.

NGOs, different from IFIs and TNCs, established with at least two interdependent purposes; advocacy and research. NGOs focusing more on advocacy work would need to gain more credibility from research finding to launch their project; for example. Reports of AI and HRW are valuable resources for other NGOs, States and even court of justice to work on human rights issues. HRW's reports is more suitable for human rights cases that need to take action in short period because it is written with the purpose to gain maximum public attention while AI's reports do not have time limitation on writing and it is worthwhile for long-term action due to its comprehensive and detailed information (Neier, 2012).

Roles of NSAs: Observations

Except IFIs and TNCs, the roles of NSAs is not certain because of flexible structure that allows staff to shift their roles to either cooperate or investigate other parties; such as States and TNCs, or even change the objective of NGOs from investigation to cooperation and vice versa. Politics and economics are one of significant reasons to make change inside NGOs, working philosophy of NGOs' leaders is also important to shift the roles to strengthen or weaken human rights. For INGOs, shareholders or donors are powerful players to shape organization's roles. Finally, NGOs cannot be independent from States or other parties as expected and it may further affect work on human rights promotion and protection. For example, some human rights violation cases occurred in government agencies may be ignored by NGOs receiving financial support from the government.

⁶ See Anghie, A. 2004. **International Financial Institutions**, in *The Politics of International Law* 217 (Christian Reus-Smit ed., Cambridge U. Press 2004), p 220 for more explanation on objective of WB and IMF.

Regarding the purposes of establishment; due to changes on human rights issues and concerns from time to time, NSAs should be flexible to expand or amend the purposes and working principles. Apparent example found in IFIs that WB changed the rules to engage human rights and relevant issues, such as good governance and rule of law, as one of indicators for achieving development of recipient countries (Anghie, 2004). For TNCs, it is also found that many of them engage human rights principles as part of management system in order to gain more credibility that will increase the business profit once and for all (Forum Asia, 2013; Reinish, 2002).

Human rights obligations for Non-State Actors (NSAs)

NSAs have got different expectation on working involved with human rights. NGOs and similar types of actors are anticipated to work on human rights rather than IFIs and TNCs, and such expectation already confirmed by reports and guidelines for INGOs including AI, HRW, UN bodies and so on (Reinisch, 2002; and Buergethal et al, 2002). For TNCs and other business sectors, although they are not in the same situation with NGOs on human rights obligation and compliance, corporates pay more effort to engage with human rights at least by including human rights principles into the code of conduct (David et al, 2014).

However, different from States, there are several important challenges for NSAs related to human rights obligations and three challenges will be briefly clarified in this article; legal framework, economic concerns and cultural barriers. The solution for told challenges is provided at the end of this session.

Legal framework:

According to the Office of the High Commissioner for Human Rights (OHCHR), States are required to obligate to respect, protect, and fulfill human rights of people living in their territories and such principles are interpreted into national and domestic laws in accordance with contexts in certain countries. The human rights indicators of States obligations on human rights have been established to assess whether States act accordingly. Hence, it is no doubt that States are obligated to comply human rights principles into national legal framework and attempt to realize it in practice.

NSAs; nevertheless, are facing different story because there is no legally binding legal framework to engage NSAs to the compliance of human rights principles. International human rights law including similar international and regional 'legal' framework talking about human rights are so-called "soft law" that do not legally require members to comply with. Therefore, unless to commit genocide, war crimes and crimes against humanity (Knox, 2011), NSAs have possibility to omit human rights principles if they would like to do so. On the other word, NSAs have 'indirect' responsibility on human rights obligations (Ruggie, 2007).

Economic concerns:

This challenge focuses on TNCs rather than other NSAs. It generally understands that requiring TNCs or business sectors to obligate on human rights may harm economic development; and it will further reduce the investment in certain countries. Therefore, States seem to be unwilling to commit the human rights principles required for the involvement of NSAs and TNCs.

Such concern already confirmed by John Gerard Ruggie – Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, as he stated in his report (2007) based on the results of a questionnaire survey distributed to States that “...states either do not fully understand or are not always able or willing to fulfill this duty [human rights obligation to business sectors]...few [states] report having policies, programs or tools designed specifically to deal with corporate human rights challenges...” Similar to Ruggie, John H. Knox (2011) also stated “...domestic governments may be unwilling or unable to prevent it from interfering with others’ human rights...”

Consequently, TNCs may probably change the investment site from countries requiring them to engage with human rights obligation to others having different requirement. For example, tobacco industry selected to locate regional office in low and middle-income countries that do not have strong domestic tobacco control and human rights regulation and in case of ASEAN; those countries are Indonesia, Philippines and Vietnam.

Cultural barriers:

Some regions coming with some cultures that become barrier to implement human right obligations not only for NSAs but also States; for example, ASEAN way and Asian Values – critical ideology and principle generated throughout ASEAN.

ASEAN way emphasizes non-interference in the domestic affairs of other state members.

(Muntarhorn, 2013; and Forum Asia, 2010) Consequently, state members are unable or unwilling to provide any recommendation relating to human rights violations that considered sensitive issues for certain countries; such as the issue of human rights violation against undocumented migrants from Myanmar. In case of human rights obligations for NSAs, the concept of ASEAN way will creates difficulty when big NGOs, INGOs and TNCs involved with human rights harm but they are too powerful for the domestic government to deal with; corruption and political interference by NSAs may occur and indirectly compel the government to stop the investigation or prosecution upon them.

Regarding Asian Values, this ideology has been strongly established in Singapore; as political strategy to solve social and cultural problems; such as drug addicted and crimes committed by young people. The Values has been promoted firstly in 1970s by Singapore government and it has been located in the national education later on (Hill, 2002). Main concept of Asian Values is about collective manners that individuals are expected to think about others; not only himself or herself as happened in the West. The Values therefore become the barrier when it is misused to blame person requesting or reporting human rights violation s/he experienced to the legal authorities with the explanation that s/he may cause problem to other people working in the same agency; for example, TNCs, if the agency is ordered to close by the court. With such misleading explanation, people facing human rights harm by NSAs decide not to disclose their hurtful experience to the public and the violations remain.

Recommendations:

With expanded interpretation, NSAs should include human rights obligation into their management system; for example, WB that finally include some issues related to human rights like good governance

and rule-of-law as explained above. International Organizations including INGOs should be promoting the implementation based on international human rights law and avoid any conflict of interest that may happen; such as collaboration with business sectors or agencies engaging human rights violation.

For TNCs, the concept of extraterritorial jurisdiction should be implemented when TNCs found to commit any human rights violation abroad and States should at least develop preventive mechanisms to offend human rights harm generated by TNCs (A/65/223, 2010). Besides legal framework, other mechanisms; such as boycott and online petition, can be utilized to stop or ‘shame’ TNCs engaging with human right violations and the power of media is important factor to escalate to power of those mechanisms.

Another international and regional mechanisms to indirect obligate TNCs and other NSAs to work more on human rights; especially, on Corporate Social Responsibility (CSR) are; for example ISO 26000⁷, ASEAN CSR Network⁸, although the knowledge improvement and capacity building on mechanisms utilization and implementation is in needed. Together with boycott and other non-legal mechanisms, ‘socially responsible investing’ is developed especially for some businesses that may be risky to violate human rights, such as tobacco companies and arms production (SIRI, cited in Reinisch, 2002). The concept of due diligence on policies, impact assessments, integration and tracking performance⁹ is also important to apply to NSAs internal management system.

Regarding the political and economic concerns, the world trend today has been shifted to be more proactive on human rights defending and protection. Therefore, TNCs engaging to promote human rights in any mean can increase their credibility that will further bring about more business investment and corporation with other partners as well as increase loyalty among customers. However, it is significant to improve knowledge and understanding between stakeholders at all level in order to strengthen and effectively utilize human rights impact assessments as well as other relevant mechanisms for NSAs. For example, in ASEAN, CSR is one of critical indicator to assess human rights impact done by NSAs; nevertheless, the understanding and information about CSR concept is still rare and unclear; and some TNCs take such loophole to implement ‘fake CSR’ to gain business profit rather than assist ‘directly affected people’ (Eikenberry and Nickel, 2006).

This article does not suggest curving out the ideology of ASEAN way and Asian Values but it should be appropriately promoted to the public and reframe it to be supportive mechanisms of human rights obligations for NSAs. One of recommendations is that to encourage people to concern on others as same as their family members, help them to get rid of human rights violations done by NSAs by reporting the legal authorities and participate in human rights impact assessments as much as possible for the sake of everyone in the society.

⁷ The international standard developed to help organizations effectively assess and address those social responsibilities that are relevant and significant to their mission and vision; operations and processes; customers, employees, communities, and other stakeholders; and environmental impact.

⁸ The ASEAN CSR Network, aims to provide opportunities for networking and exchange, to be a venue for discussing and addressing regional issues and concerns, and to be advocate and capacity builder for acceptance of international norms of CSR behavior. It also seeks to serve as a centralized repository of all the information gathered and provide easy access to participating organizations and partners in the region. More information from <http://www.asean-csr-network.org/c/>

⁹ See A/HRC/8/5 paras. 56-64.

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