

Indonesia Focal Point For Legally Binding Treaty Initiative

Written contribution to the Second Session of the Open-ended inter-governmental working group on transnational corporations and other business enterprises with respect to human rights
30 September 2016

The frame of contribution

1. The Indonesia Focal Point for Legally Binding Treaty Initiative, hereinafter IFP, is a coalition of Indonesians organisations working on human rights, migrant workers, women rights, environment, rule of law, indigenous groups, right to water, and other protection of rights of groups. The IFP would shared some contribution for the benefit of the formulation of the intended "legally binding instrument" (hereinafter LBI) as established by resolution A/HRC/RES/26/9. As such, IFP intend to contribute continuously and positively for the process, eventually, to the legally binding instrument.
2. This contribution take the process of the debate so far on the subje^t, and the process of first session of the Intergovernmental Working Group (hereiafter IGWG). The contribution consider greatly the situation of Indonesia, and also Asia-Africa, as those regions have been to seek normative foundation of human rights governing transnational corporations and other business enterprises (hereianfter "TNC"). Some on this contribution take general approach, and case-approach to highlight the fundamental condition for the establishment LBI

International norm on legally binding instrument

3. IFP take a very strong argument for the establishment of LBI as normative foundation. As IFP look into wider situation of Indonesia, as also Asia-Africa, where there is situation where transnational conduct of trade and investment dominates state and society affairs, so far that the domination overstep and pushing aside state obligation in international for a. State party is bound by international law in many areas but not in how state develop a strong norm on human rights governing economic affairs. **State party is and should be the legitimate party in international affairs.**
4. The state party is increasingly dealing with a very complex affairs as a transnational context. Among them are the dealing with trade and investment. Indonesia, as in most of in Asia-Africa, endured various issues where transnational economic actors are far more intrusive, short-termism, and well served by international legal establishment. Those mostly relate to the situation of land grabbing, water grabbing, new extractivism, and global imbalance. **There is strong indication that state party loose their relevance in conducting international affairs, mostly on human rights including women rights.** The IFP would also refer to the report of Report of the Independent Expert on the promotion of a democratic and equitable international order, Alfred Maurice de Zayas, A/HRC/30/44, 14 July 2015)
5. The transnational dominance of economic actors, in most cases, create their own self-servicing rule. Those expand into land tenure, extractive commercialisation including on water, dominance on seed and food system, exploitation of migrant workers, tax system, regulatory arbitrage. In those cases, **state party and rights holders suffers the situation where human rights is not upheld and is outright violated.**
6. As per international norm, UN Human Rights Council is the right transnational party to set necessary standard on human rights. Therefore, it is necessary and imperative that the Council

develop a standard setting on human rights in which it governing the conduct of transnational economic actors and conduct. **This emphasise that the standard should be a legally binding one. Any voluntary means is not UN instruments, and is not part of the correct process of the Council.** This should explain that it is quite misleading that ones always look into law enforcement where there is not any proper and fundamental norm established internationally.

State obligation

7. As per international norm, the state party has obligation to set standard by means of constitution-derived law, legislation, court cases, and various law enforcement. Those are the key where state party should develop anti-discriminator measures, and, address the discrimination and violence happen in their own jurisdiction. **Many contemporary discrimination are also coming from transnational conduct. In this context, the state party should uphold the internationally recognised obligation.** This should also employ and enable the state party to exercise the extraterritoriality of this obligation.
8. The lagging realisation of human rights protection by state party should embark on the long term process of progressive realisation of human rights. This will include the exercise fundamental part of those obligation (by constitution, legislation, law enforcement), develop means, facilitation and resources where rights are properly enjoyed by their citizens. The progressive realisation should also look into present situation where certain segment of society, namely transnational economic actors and conduct, are very dominant. **The state party should not assume that their obligation is or should be replaced and extended by transnational economic actors.**
9. The state party is wider and numerous commodification of natural resources. There is strong competition into this natural resources, and into how natural resources is morphed into other. This situation explain the new extractivism. **The transnational economic actors is competing (and trying hard still) on owning the natural resources, including on putting them into financial instruments.** This creates further domination where those actors easily come into monopoly and ultra-dominance against state party and rights holder.
10. The situation as it happen in the context of Indonesia refer to the dominance of transnational palm oil corporation, pulp and paper corporation, (e.g. Sumatera, Kalimantan), the reclamation which served by transnational actors (e.g. in Jakarta, Bali), the ever increasing dominance of corporation onto seed system (in the food system, in agriculture in Indonesia), strong drive and exploitation by transnational mining actors (e.g. Sulawesi, Sumatera, Kalimantan, West Nusa Tenggara, Papua), the impact of land dominance by transnational actors towards rural women and Indigenous women (Kalimantan, Sulawesi, Sumatera, Nusa Tenggara, Papua), the present exploitation towards migrants workers, the commodification and collateralisation of water, the commodification and financialisation natural resources, particular forest (e.g. REDD project in Kalimantan) the expulsion of indigenous groups on cases where their land tenure is overrun by business actors. **Those cases expose the dominance of transnational economic actors and the non-existent of international norm which should have put the state as rightful party to develop human rights including women rights promotion and protection in relation with transnational corporation and other business enterprises.** This situation is not unique Indonesia since those also increasingly happen in most of Asia-Africa (this could also refer to the subsequent report by then UN Special Rapporteur on Right to Food, Mr. Olivier de Schutter).

Several internationally relevant measures into the norm

11. The situation of victims and survivors of human rights violence related with transnational national corporations expose the fundamental need for remedial measures. As the state party deal with the belligerents and perpetrators on human rights violence, victims and survivors are often neglected. Mostly they are regarded as “necessary social cost”, thus prolong and extend impunity. **The remedy should be integrated into the norm.**
12. **The democratic process obligates the state party to involve society and affected segment society to discuss the matter of public interest.** In any event, the free prior informed consent is fundamental in the public decision making regardless of forms of government or of sovereign institutions.
13. There are several paramount cases where state failed to perform fundamental and other relevant obligation, including on human rights –hence state failure. Those could relate with the situation of war, kleptocratic state, horizontal conflict, or other causes. **In most of this situation, it is far greater necessary where human rights particularly women rights promotion and protection is exercised by citizens and victims-survivors, including through international relevant UN human rights institutions.** This measures should be developed into the norm.
14. The citizens and victims-survivors where human rights violence happened are well placed for any accountability and legal demand. They will use the relevant and important exhibits of examinations and other testimonials as main basis for them to develop promotion and protection on human rights. **This exhibits and testimonials is and should be accepted in any relevant process in UN human rights institutions and other international institutions, as the component of the norm.** This is very fundamental where the perpetrator is of transnational actors and where state stop short in exercising the extraterritoriality of their obligation concerning referred violation.

Human rights defender

15. Citizen and victims-survivors has been exercising their right through various ways and means. This contribute greatly in addressing human rights situation, especially where international actors are the perpetrators and/or accomplices. Their exercise is recognised in the international human rights norm as the key part of declaration on human right defender. This role should be made into norm of LBI.
16. This role is also well credited in the sectors where international economic actors dominant. The role in environment, in migrant workers, rule of law, in protection of right to water, in traditional seed and food system, in empowerment of rural and indigenous women, in the indigenous groups, and many other. Their situation may expose several differences in the referred sectors. The recognised role of human defender should go insofar onto exposing how the unique situation of economic sectors mounting into discrimination and outright human rights violence.
17. As the reference, Indonesia has a law governing environment. This law position (relevant) citizen and victims-survivors as participant in the protection and on conservation of environment. This law also put put punitive damage to the perpetrators and belligerents. This model could be employed on how the LBI develop the component of human right defender in it.

Rights of affected group

18. Human rights violence and discrimination frequently happen without attention of parties in human rights particularly women rights promotion and protection. Where those happen and effected by transnational economic actors, the affected group should have justified place in the norm as to how to mount on self direct defense. In the longer run, their defence should be transformed into proper legal means, but, as that happen, the direct defense should be justified.
19. The affected group should be also able to demand the accountability of the transnational economic actor who directly party or complicit in the human rights violence and discrimination. Their case should point to the dominance of the actors and the ineffectiveness of state party.
20. The affected group should develop public mechanism as this also develop state obligation – effectively putting state back to the correct position in international norm

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